Supreme Court, U.S.
FILED

04 684 NOV 17 2004

OFFICE OF THE CLERK

NO.

IN THE

Supreme Court of the United States

TEN TAXPAYER CITIZENS GROUP, ET AL.,

Petitioners,

v.

CAPE WIND ASSOCIATES, LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN W. SPILLANE
Counsel of Record
SPILLANE & SPILLANE LLP
23 Institute Road
Worcester, Massachusetts 01609
(508) 756-4342

Dated: November 17, 2004

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

Whether or not the First Circuit erred in affirming the Federal District Court's denial of the Petitioners' Motion to Remand the action to the state court in which it was originally filed.

LIST OF PARTIES

The Petitioners, TEN TAXPAYER CITIZENS GROUP PURSUANT TO M.G.L. c.214, §7A; CAPE COD MARINE TRADES ASSOCIATION, INC., RAOUL D. ROSS AND THE MASSACHUSETTS BOATING AND YACHT CLUBS ASSOCIATION, INC. The members of the Ten Taxpayers Citizens Group are:

Morris I. Johnson, Jr.,
Chairman
113 Jefferson Avenue
West Yarmouth, MA 02664

Liam Monahan
29 Lakeview Drive
Centerville, MA 02632

Timothy K. Lovelett
11 Homestead Lane
Yarmouth Port, MA 02675

Charles Hutchinson
97 Pine Point Drive
Centerville, MA 02632

Loring W. Wordell, Jr.
208 Lincoln Road
Hyannis, MA 02601

Elizabeth A. Wordell
208 Lincoln Road
Hyannis, MA 02601

Edward F. Lewis
97 Edgewater Drive East
East Falmouth, MA 02536

Steven A. Nims
22 Eldridge Road
S. Yarmouth, MA 02664

Charles A. Whitcomb
88 Greenwood Avenue
Hyannis, MA 02601

Linda M. Whitcomb
88 Greenwood Avenue
Hyannis, MA 02601

Dean F. Meehan
61 Channel Point Road
Hyannis, MA 02601

The Respondent, CAPE WIND ASSOCIATES, LLC

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

Procedural History 3

REASONS FOR GRANTING THE WRIT 4

I. THE FIRST CIRCUIT'S DECISION THAT § 1333(a)(2) OF OCSLA MAKES STATE LAW APPLIED TO THE FEDERAL WATERS OF NANTUCKET SOUND SURROGATE FEDERAL LAW DEFIES THE PLAIN LANGUAGE OF THE FCMA. 7

A. The FCMA Was Enacted by Congress In Part to Protect the Substrate or Seabed of Nantucket Sound. 7

B. Because of the FMCA's Delegation of Regulatory Power to the Commonwealth Pursuant to 16 U.S.C. §1856(a)(2)(B), the Commonwealth Acts to Exert and Enforce Its Own Laws Within the Federal Waters of Nantucket Sound- State Law is Not Adopted as Surrogate Federal Law and Enforced by Federal Agencies. 12

CONCLUSION 13

APPENDIX 1a

TABLE OF AUTHORITIES

CASES:

Dept. of Banking and Finance, State of Florida v. *U.S. Trust Corp.*, 610 F. Supp. 919 (D.C. Fla. 1985) 6

Dunn v. *Secretary of U.S. Department of Agriculture*, 921 F.2d 365 (1st Cir. 1990) 10

Estey v. *Commissioner, Maine Department of Human Services*, 21 F.3d 1198 (1st Cir. 1994) 10

Strickland v. *Commissioner Maine Department of Human Services*, 48 F.3d 12 (1st Cir. 1995) 10

CODES AND STATUTES:

United States Code

16 U.S.C. § 1801(a)7 ..... 5, 8
16 U.S.C. § 1801(b)7 9
16 U.S.C. § 1802 8
16 U.S.C. § 1802(10) 5
16 U.S.C. § 1802(14) 8
16 U.S.C. § 1852-55 11
16 U.S.C. § 1853(b) 10
16 U.S.C. § 1855(b)(4)(A) 9
16 U.S.C. § 1856(a)(2) 7
16 U.S.C. § 1856(a)(2)(B) 5, 6, 11, 12, 13
28 U.S.C. § 1254(1) 1, 4
28 U.S.C. § 1291 4
43 U.S.C. § 1301 *et seq.* 4
43 U.S.C. § 1331 *et seq.* 3, 4
43 U.S.C. § 1333(a)(2) 4, 5, 7, 12

Massachusetts General Laws

c. 214, § 7A 3

OPINIONS BELOW

The August 19, 2004 order of the First Circuit denying en banc hearing is attached at Appendix A, A. 1a.

The June 28, 2004 order and opinion of the First Circuit affirming the United States District Court's August 19, 2003 order is attached at Appendix B, A. 3a.

The August 19, 2003 order and opinion of the United States District Court dismissing the action is attached at Appendix C-D, A. 28a-29a.

The January 31, 2003 order of the First Circuit denying an interlocutory appeal of the November 14, 2002 order is attached at Appendix E, A. 34a.

The November 14, 2002 order of the United States District Court denying remand is attached at Appendix F, A. 35a.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Magnuson Fisheries Conservation Management Act, 16 U.S.C. § 1800 *et seq.*

Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.*

STATEMENT OF THE CASE

Nantucket Sound is a pristine public resource encompassing the body of water between the south coast of Cape Cod and the islands of Martha's Vineyard and Nantucket. The waters contained within are partly federal and partly state owned. Cape Wind Associates, LLC ("Cape Wind"), a private developer, ultimately seeks to exploit this resource for private gain by siting a private energy facility that will cover 23-square miles of the federal waters of Nantucket Sound. This proposed energy facility will consist of over 130 windmills, each one rising over 400 feet above the ocean's sea level.

In part to probe the path of least regulatory resistance for obtaining permission to commence with its exponentially larger proposed private energy facility, Cape Wind first erected a scientific measurements device station ("SMDS") on Nantucket Sound armed with nothing more than a "navigability permit" issued by the U.S. Army Corps of Engineers. The SMDS was erected in the federal waters of Nantucket Sound that fall outside the three-mile zone owned by the Commonwealth pursuant to the Submerged Lands Act.

In doing so, Cape Wind ignored relevant Massachusetts state law which would have required an independent state authorized regulatory review of the proposed SMDS. Although these federal waters are owned by the United States, they are expressly subject to the direct jurisdiction of the Commonwealth under the Magnuson Fisheries Conservation Management Act ("FCMA"). By virtue of the express language of the FCMA , the Commonwealth stands in the shoes of the federal government to carry out the express goals of the FCMA to protect the "essential fish habitat" and "substrate", or seabed of Nantucket Sound.

Until required permits have been issued by the Commonwealth authorizing the erection of the SMDS, the existence of the SMDS is in violation of state law.

Pursuant to M.G.L. c. 214, § 7A, the Plaintiffs ("Ten Taxpayers"), a citizens group comprised of at least ten taxpayers, have absolute standing to represent the Attorney General and bring suit to seek the enforcement of the Commonwealth's environmental protection statutes. The Plaintiff's ("Ten Taxpayers") Verified Complaint presented only state claims on its face, and was filed in the Massachusetts Trial Court. It named no federal defendants and made no federal claims. Despite the exclusive nature of the state claims presented therein, the First Circuit Court of Appeals affirmed the order of the United States District Court of the District of Massachusetts denying remand after the action was improvidently removed from state court. As a result, the state law claims have never been litigated in the state forum where they properly belong.

Procedural History

On October 16, 2002, The Ten Taxpayers filed their Verified Complaint in Barnstable County Superior Court. The Complaint was immediately removed by Cape Wind to the United States District Court. The Ten Taxpayers moved for remand, and such motion was denied without hearing or opinion on November 14, 2002. An appeal of the order was denied on the basis that the denial of remand was not a final judgment. On August 19, 2003, the United States District Court dismissed the Verified Complaint without hearing upon Cape Wind's motion filed November 6, 2002.

Ten Taxpayers timely filed their appeal of the United States District Court's denial of remand and

dismissal of the action on September 19, 2003, properly citing 28 U.S.C. § 1291 and 28 U.S.C. § 1254(1) as jurisdictional grounds to bring the appeal. The First Circuit Court of Appeals affirmed the denial of remand and dismissal on June 28, 2004. The Ten Taxpayers timely moved for en banc review, and such request was denied on August 19 , 2004.

The First Circuit Court of Appeals stated that the Ten Taxpayers' claims arose under federal law, based upon the Outer Continental Shelf Lands Act ("OCSLA") 43 U.S.C. § 1331 *et seq.* Specifically, the First Circuit held that whereas § 1333(a)(2) of the OCSLA adopts state law as surrogate federal law in federal waters to cover gaps in coverage by federal law, the state law violations alleged by the Ten Taxpayers are actually questions of federal law. In determining that these questions of federal law supported removal, the First Circuit omitted one crucial factor- there is no gap in coverage by federal law for the federal waters of Nantucket Sound. By its very terms, the FCMA provides for the regulation of the federal waters of Nantucket Sound. The FCMA's express grant of regulatory power over the federal waters of Nantucket Sound to the Commonwealth, therefore, is distinctly different from the default body of federal law established under § 1333(a)(2) of OCSLA.

REASONS FOR GRANTING THE WRIT

As the First Circuit aptly noted, the law dividing regulatory authority over Nantucket Sound between the federal and state governments is rather obscure. The Commonwealth's regulatory power over the federal waters of Nantucket Sound is a site-specific oddity; resulting from the convergence of the Submerged Lands Act's ("SLA") three mile limit of state jurisdiction and the island geography of Nantucket and Martha's Vineyard. See 43 U.S.C. § 1301 *et seq.*

This convergence results in a pocket of federal water being virtually surrounded by Commonwealth waters. The special regulatory powers afforded the Commonwealth over this pocket of federal water pursuant to § 1856(a)(2)(B) of the FCMA responds in a localized manner to the impractical effects of the otherwise plastic application of the SLA's three mile limit of state jurisdiction, and allows the Commonwealth to regulate the entirety of Nantucket Sound.

Nonetheless, despite its obscurity, the law is clear and unambiguous. The Commonwealth possesses statutory and regulatory authority over the federal waters of Nantucket Sound "for all purposes" of the FCMA § 1856(a)(2)(B). One of the express legislative intents of the FCMA is to protect the "essential fish habitat" and "substrate", or seabed of Nantucket Sound. 16 U.S.C. § 1801(a)7, 16 U.S.C. § 1802(10). Therefore, the FCMA's delegation of power to the Commonwealth under § 1856(a)(2)(B) statutorily authorizes the Commonwealth to regulate these localized waters for the purposes of protecting the substrate or seabed as defined *supra*. Clearly then, because the FCMA expressly articulates a complete regulatory scheme over the federal waters of Nantucket Sound, there are no gaps left to fill pursuant to § 1333(a)(2) of OCSLA. As a result, no state laws are adopted pursuant to § 1333(a)(2) of OCSLA as surrogate federal law for regulating the substrate or seabed of the federal waters of Nantucket Sound. Instead, state law operates of its own accord and is enforced by the Commonwealth pursuant to the permissive grant of authority of § 1856(a)(2)(B) of the FCMA. Therefore, the Ten Taxpayers' claims that Cape Wind violated state laws in erecting the SMDS present no federal questions that would support removal.

Although Nantucket Sound is geographically relatively small, and the law particularly localized, the result of an improper analysis of removal jurisdiction by the First Circuit looms large and extremely adverse to the Commonwealth. With the improvident removal and dismissal of the Ten Taxpayers state claims, there has been no opportunity for the Commonwealth to interpret the contours of its own laws. A case of first impression interpreting a Massachusetts statute is appropriately decided by a Massachusetts court. *Dept. of Banking and Finance, State of Florida* v. *U.S. Trust Corp.*, 610 F. Supp. 919 (D.C. Fla. 1985). In the *Department of Banking* case, the Federal District Court recognized the intent of Congress to allow the Florida Legislature to choose whether or not to open its borders to out-of-state banks. Therefore, the district court allowed Florida courts the opportunity to interpret the resulting law enacted by the Legislature. Similarly, Congress expressly desired Massachusetts to regulate the federal waters of Nantucket Sound pursuant to §1856(a)(2)(B) of the FCMA. Under the *Department of Banking*, the lower Courts should have allowed Massachusetts courts the opportunity to interpret and apply the existing state environmental legislation as a case of first impression.

Where the SMDS is a precursor to a $700 million dollar private project developed on a pristine public resource, the improvident removal and denial of remand of the Ten Taxpayers' state action deprived the Commonwealth of any meaningful opportunity to discharge its duties under the FCMA. For the Cape Cod and Island community that derives much of its economic success directly from its proximity to a pristine water resource, the private development of this public resource presents grave ecological and economic danger and threat of harm.

These reasons for granting certiorari are further expanded hereafter in this Petition.

I. THE FIRST CIRCUIT'S DECISION THAT § 1333(a)(2) OF OCSLA MAKES STATE LAW APPLIED TO THE FEDERAL WATERS OF NANTUCKET SOUND SURROGATE FEDERAL LAW DEFIES THE PLAIN LANGUAGE OF THE FCMA.

The First Circuit rejected each basis raised and briefed by Cape Wind as grounds for supporting removal jurisdiction. Ultimately, the First Circuit identified a basis for removal jurisdiction that neither party thought relevant to raise. The First Circuit stated that the Ten Taxpayers' claims did arise under federal law pursuant to § 1333(a)(2) of OCSLA. Respectfully, the position taken by the First Circuit is indefensible.

Under § 1333(a)(2) Congress explicitly incorporated state law on the Outer Continental Shelf as surrogate federal law to fill gaps not otherwise provided for by Congress through legislation. The First Circuit's holding supporting removal jurisdiction necessarily made two assumptions: 1) no federal law was enacted by Congress to protect the substrate or seabed of the federal waters of Nantucket Sound, and 2) the state claims made by the Ten Taxpayers, if applicable, were only applicable as surrogate federal law—hence they morphed into federal questions. These two assumptions stand in defiance of the express language of both the FCMA and OCSLA.

A. The FCMA Was Enacted by Congress In Part to Protect the Substrate or Seabed of Nantucket Sound.

The District Court's decision struck the cautionary note that the Commonwealth's exclusive regulatory jurisdiction under the FCMA is limited "for the purposes of this Act" (See 16 U.S.C. § 1856(a)(2)). Any

inquiry into these "purposes" must necessarily begin with the language of the statute.

Found prominently within the FCMA, 16 U.S.C. § 1801(a)7 entitled "Findings" states,

> "The Congress finds and declares the following: A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, *to facilitate long-term protection of essential fish habitats*, and to realize the full potential of the Nation's fishery resources." (Emphasis added).

As they are used by Congress in 16 U.S.C. § 1801(a)7, a commonsense reading of the terms "essential fish habitat" and "fishery resources" would dictate that these constitute the physical habitats in and upon which fish are found. Definitions of the terms "essential fish habitat" and "fishery resources" found within the FCMA confirm this assertion. Entitled, "Definitions", 16 U.S.C. § 1802 states,

> "(10) The term *"essential fish habitat" means those waters and substrate* necessary to fish for spawning, breeding, feeding, or growth to maturity." (Emphasis added).

Additionally, 16 U.S.C. § 1802(14) states, "The term 'fishery resource' means any fishery, any stock of fish, any species of fish, and *any habitat of fish*." (Emphasis added.)

Ineluctably, this unambiguous language states that the purposes of the FCMA included the protection of

the physical habitats upon which fish are found, including the "substrate", or seabed surface upon which these fish habitats rely.

Unambiguously supporting this contention is the FCMA language found in 16 U.S.C. § 1801(b)7 entitled, "Purposes". It states,

> "It is therefore declared to be the purposes of the Congress in this Act- *to promote the protection of essential fish habitat in the review of projects conducted under Federal permits*, licenses, or other authorities that affect or have the potential to affect such habitat." (Emphasis added.)

This language unambiguously twins the review of projects under federal permits to the review procedures prescribed under the FCMA when such projects present any potential effect to the "substrate", or seabed of protected waters.

This unambiguous language contained in the "purpose clause" of the FCMA is given legislative teeth in 16 U.S.C. § 1855(b)(4)(A) entitled, "Other requirements and authority". This Congressional directive empowers the authority charged to carry out the purposes of the FCMA to challenge the grant of a permit by a federal agency for any project potentially impacting essential fish habitats. The language clearly states,

> "(b) Fish habitat. (4)(A) If the Secretary receives information from a Council or Federal or State agency or determines from other sources that *an action authorized, funded, or undertaken, or proposed to be authorized, funded or*

> *undertaken, by any State or Federal agency would adversely affect any essential fish habitat* identified under this Act, the Secretary shall recommend to such agency measures that can be taken by such agency to conserve such habitat." (Emphasis added).

Further underscoring its purpose of protecting not only fish, but "essential fish habitats" and "substrate" the FCMA, contains a broad "catch-all" mandate. 16 U.S.C. § 1853(b) entitled "Discretionary Provisions" states, "Any fishery management plan which is prepared by any council, or by the Secretary, with respect to any fishery, may-

> "'(12) *prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.*'" (Emphasis added).

Where the clear unambiguous language of the FCMA specifies the directive of protecting "essential fishing habitats" and "substrate", the statute's clear language speaks for itself and is unassailable. *Dunn* v. *Secretary of U.S. Department of Agriculture*, 921 F.2d 365 (1st Cir. 1990); *Strickland* v. *Commissioner Maine Department of Human Services*, 48 F.3d 12 (1st Cir. 1995); *Estey* v. *Commissioner, Maine Department of Human Services*, 21 F.3d 1198 (1st Cir. 1994).

In sum, the clear language of the FCMA 1) mandates the protection of essential fishing habitats including the substrate or seabed, 2) creates and charges certain authorities with this mandate, and 3) empowers these authorities to challenge any federal

agency seeking to grant a permit for work potentially impacting these fishery resources.

The next logical step of the analysis begs which authority is charged with the duties mandated under the FMCA. Absent any delegation of the power from the federal government to the state government, the FMCA dictates that the primary enforcement duties fall to the Secretary of Commerce, and the New England Fishery Management Council. (See 16 U.S.C. § 1852-55). However, there is a clear Congressional delegation of authority that places enforcement of the FCMA with the Commonwealth for the federal waters contained within Nantucket Sound. Clear and unambiguous language contained within the FMCA at 16 U.S.C. § 1856(a)(2)(B) states,

> "(2) For the purpose of this Act, except as provided in subsection (b) of this section the jurisdiction and authority of a State shall extend- (B) with respect to the body of water commonly known as Nantucket Sound, to the pocket of water west of the seventieth meridian west of Greenwich..."

Therefore, "For the purposes of this Act {FCMA}," the Commonwealth is required to exercise its authority to ensure that the goals of the FCMA are met. In short, the Commonwealth stands in the shoes of the federal government to further the stated goals of the FCMA. The Ten Taxpayers' Complaint asserts that various Massachusetts statutes control the regulation of fishery resources under the Commonwealth's jurisdiction. It further asserts that Commonwealth agencies possess this regulatory control, and Cape Wind's violation of the provisions of these statutes creates state causes of action only.

B. Because of the FMCA's Delegation of Regulatory Power to the Commonwealth Pursuant to 16 U.S.C. § 1856(a)(2)(B), the Commonwealth Acts to Exert and Enforce Its Own Laws Within the Federal Waters of Nantucket Sound- State Law is Not Adopted as Surrogate Federal Law and Enforced by Federal Agencies.

§ 1333(a)(2) of OCSLA, reduced to its simplest principle, demands the adoption of state law and the application of it as surrogate federal law on the Outer Continental Shelf when Congress has not otherwise filled the gap with specific legislation. § 1333(a)(2) of OCSLA is wholly inapplicable when Congress has already enacted legislation controlling a particular field on the Outer Continental Shelf. The First Circuit stumbled in failing to acknowledge that the FCMA's special grant of power to the Commonwealth pursuant to 16 U.S.C. § 1856(a)(2)(B) eliminated any potential gaps in the exercise of regulatory authority over the substrate or seabed of the federal waters of Nantucket Sound. First, § 1856(a)(2)(B) specifically ceded jurisdiction of this small, localized body of water to the Commonwealth. Second, it expressly stated the goals to be achieved by the Commonwealth in regulating the federal waters of Nantucket Sound. The Circuit Court's error in affirming the denial of remand was so profoundly simple, yet so costly to the Ten Taxpayers and the immense interests of the Commonwealth of Massachusetts in these waters, that Justice so requires the Writ of Certiorari to be granted.

CONCLUSION

Cape Wind erected its SMDS on a pristine public resource armed with nothing more than a mere navigability permit issued by the Army Corps of Engineers. Its stated goal is to follow the same procedure in erecting its exponentially larger 23 square mile private energy facility consisting of 130 windmills each in excess of 400 feet in height. No state regulatory review was sought despite the fact that under 16 U.S.C. § 1856(a)(2)(B) of the FCMA it is the Commonwealth that is legislatively charged with regulating the substrate, or seabed of these federal waters. Commonwealth regulatory review is needed to prevent the exploitation of the centerpiece of a vibrant Massachusetts Cape and Island community. The enormity of the proposed private energy facility, and the fact that it is the first of its kind to be proposed in United States waters both require this Honorable Court's review. For the foregoing reasons, the Petitioners, through their attorney, respectfully request that a writ of certiorari issue.

Respectfully submitted,

JOHN W. SPILLANE
Counsel of Record
SPILLANE & SPILLANE LLP
23 Institute Road
Worcester, Massachusetts 01609
(508) 756-4342

Dated: November 17, 2004

APPENDIX TABLE OF CONTENTS

APPENDIX A

Order of Court of the United States Court of Appeals for the First Circuit, dated August 19, 2004 ..... 1a

APPENDIX B

Opinion of the United States Court of Appeals for the First Circuit, dated June 28, 2004 ..... 3a

APPENDIX C

Order allowing Motion to Dismiss, dated August 19, 2003 ..... 28a

APPENDIX D

Memorandum, dated August 19, 2003 ..... 29a

APPENDIX E

Judgment from the United States Court of Appeals, dated January 31, 2003 ..... 34a

APPENDIX F

Denial of Motion to Remand, dated November 14, 2002 ..... 35a

APPENDIX G

Notice of Removal, dated October 21, 2002 ..... 36a

With Attachment:

Plaintiffs' Verified Complaint for Declaratory and Injunctive Relief 41a

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 03-2323

TEN TAXPAYER CITIZENS GROUP; CAPE COD MARINE TRADES ASSOCIATION, INC.; RAOUL D. ROSS; THE MASSACHUSETTS BOATING AND YACHT CLUBS ASSOCIATION, INC.,
Plaintiffs, Appellants,

v.

CAPE WIND ASSOCIATES, LLC,
Defendant, Appellee.

Before

Boudin, Chief Judge,
Coffin, Senior Circuit Judge,
Torruella, Selya, Lynch, Lipez and Howard, Circuit Judges,

ORDER OF COURT

Entered: August 19, 2004

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Richard Cushing Donovan, Clerk.

By_____
Chief Deputy Clerk.

[cc: Messrs: Spillane, Spillane, Dacey and Hague]

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 03-2323

TEN TAXPAYER CITIZENS GROUP; CAPE COD MARINE TRADES ASSOCIATION, INC.; RAOUL D. ROSS; THE MASSACHUSETTS BOATING AND YACHT CLUBS ASSOCIATION, INC.,

Plaintiffs, Appellants,

v.

CAPE WIND ASSOCIATES, LLC,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro, U.S. District Judge]

Before

Torruella, Circuit Judge,
Coffin, Senior Circuit Judge,
and Lynch, Circuit Judge.

John W. Spillane, with whom Spillane & Spillane, LLP was on brief, for appellants.

Kurt W. Hague, with whom Timothy J. Dacey and Goulston & Storrs, P.C. were on brief, for appellee.

June 28, 2004

LYNCH, Circuit Judge. This appeal is an early round in the legal battle over whether a commercial wind energy farm may be built in Nantucket Sound.

In October 2002, Ten Taxpayer Citizens Group and several additional plaintiffs (together, Ten Taxpayer) filed a lawsuit in Massachusetts state court to prevent Cape Wind Associates from erecting a 197-foot data collection tower in Nantucket Sound. The complaint alleged that Massachusetts state courts had jurisdiction over the project and that Cape Wind had failed to obtain the necessary permits under state law. Cape Wind removed the action to federal court and Ten Taxpayer moved to remand. After denying the motion to remand, the district court dismissed the complaint on August 19, 2003.

On appeal, Ten Taxpayer argues that the district court was obligated to remand the case to state court for lack of federal subject-matter jurisdiction. Ten Taxpayer also challenges the court's dismissal of the complaint. We affirm.

I.

The facts underlying this case are essentially undisputed. Where the parties disagree, we accept as true the well-pleaded factual allegations in the plaintiffs' complaint, drawing all reasonable inferences in their favor. Soto-Negron v. Taber Partners I, 339 F.3d 35, 38 (1st Cir. 2003).

Cape Wind is a limited liability corporation based in South Yarmouth, Massachusetts. Its goal is to construct a commercial windmill farm on Horseshoe Shoals, a shallow area of Nantucket Sound more than three miles offshore. The proposed windmill farm includes at least 130 industrial wind turbines, each 470 feet tall. If it is completed as presently envisioned, the facility will spread across 28 square miles of Nantucket Sound and will be visible from shore. The project is the first of its kind in North America.

To construct the wind farm, Cape Wind needs extensive meteorological and oceanographic data concerning conditions on Horseshoe Shoals. For that purpose, Cape Wind in late 2001 announced plans to build a "scientific measurement device station" (SMDS) on Horseshoe Shoals. Intended as a temporary facility, the SMDS was designed to collect data for five years. It would consist of a data tower rising approximately 200 feet in the air, supported by three steel pilings driven 100 feet into the seabed. Together with its tripodal support structure, the tower would occupy about 900 square feet of ocean surface.

On August 19, 2002, the United States Army Corps of Engineers issued a permit to Cape Wind under § 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 et seq., for construction of the SMDS.[1] Cape Wind neither sought nor obtained permits for the SMDS project under Massachusetts law. A few weeks later, the Coast Guard issued a public notice that construction of the data tower would commence on or about October 11, 2002. Construction was briefly delayed when Ten Taxpayer obtained a temporary restraining order from a state court in a related

---

[1] We express no view concerning the validity of this permit, which is the subject of a separate appeal in this court. See Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, No. 03-2604 (1st Cir. docketed Nov. 24, 2003).

lawsuit. Ten Taxpayer voluntarily dismissed that suit, however, and the temporary restraining order lapsed by its own terms. On October 27, 2002, Cape Wind began construction of the SMDS. It is now complete and in operation.[2]

Ten Taxpayer filed this action in Barnstable Superior Court on October 16, 2002, shortly before construction of the data tower began. In its complaint, Ten Taxpayer acknowledged that the SMDS site is more than three miles from the nearest Massachusetts shoreline and that, accordingly, the location falls under the jurisdiction of the federal government. Nevertheless, Ten Taxpayer contended, Cape Wind could not build the SMDS without regulatory approval from Massachusetts because Congress has ceded to Massachusetts the power to regulate any activity affecting fishing in Nantucket Sound. Under the Massachusetts laws regulating fisheries and fish habitats, administrative approval is required for structures erected on the seabed. Because Cape Wind did not obtain such approval, Ten Taxpayer alleged, the SMDS project was in violation of Massachusetts law. Ten Taxpayer sought an injunction blocking construction of the SMDS or, if the court would not enjoin construction, a $25,000 fine for every day that the SMDS remained on Horseshoe Shoals.

Cape Wind immediately removed the case to federal court, asserting that federal jurisdiction was proper because Ten Taxpayer's complaint, on its face, states a federal question -- i.e., whether Congress has in fact delegated to Massachusetts the necessary regulatory authority over Nantucket Sound. In the alternative, Cape Wind argued that regardless of what Ten Taxpayer actually pleaded in its complaint, deciding Ten Taxpayer's state claims would require resolution

---

[2] See generally http://capewind.whgrp.com (last visited June 22, 2004) (reporting real-time data from the SMDS).

of a substantial question of federal law, cf. Almond v. Capital Props., Inc., 212 F.3d 20, 23 (1st Cir. 2000) (describing so-called Smith jurisdiction), and that federal law completely preempts state law beyond three miles from the coast, cf. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6-7 (2003) (describing the "complete preemption" doctrine). Ten Taxpayer moved to remand.

On November 14, 2002, the district court denied the motion to remand without opinion. Ten Taxpayer appealed that order, but this court dismissed the appeal on the ground that it was not a final judgment.

Meanwhile, on November 6, 2002, Cape Wind filed a motion in federal court to dismiss Ten Taxpayer's complaint. Cape Wind attached to its motion two letters from the Massachusetts Department of Environmental Management indicating that, at least under Mass. Gen. Laws ch. 132A, Massachusetts does not claim regulatory authority over activities on Horseshoe Shoals. Cape Wind also argued that Ten Taxpayer lacks standing to assert the Commonwealth's regulatory interest in offshore lands.

On August 19, 2003, the district court granted Cape Wind's motion to dismiss. Ten Taxpayers Citizen Group v. Cape Wind Assocs., LLC, 278 F. Supp. 2d 98, 101 (D. Mass. 2003). The court concluded that although Congress did delegate to Massachusetts the power to regulate fishing in Nantucket Sound, that grant did not confer on the Commonwealth a general warrant to "polic[e] the entire Nantucket Sound for environmental disturbances that could impact fishing." Id. Massachusetts had no authority over the construction of the SMDS, and thus no state permits were required. Id.

Ten Taxpayer filed this timely appeal.

II.

This case implicates the complex and rather obscure body of law that divides regulatory authority over Nantucket Sound between the state and federal governments. Because that body of law is essential to our disposition of this appeal, we summarize it briefly.

A. Regulation of the Seabed and Attached Structures

As a general rule, "paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty." United States v. Maine (Maine I), 420 U.S. 515, 524 (1975). In a series of cases beginning in 1947, the Supreme Court established that the United States enjoys exclusive title in the lands underlying the sea, regardless of a state's historical claims to the waters off its coast. See United States v. Texas, 339 U.S. 707, 719-20 (1950); United States v. Louisiana, 339 U.S. 699, 705-06 (1950); United States v. California, 332 U.S. 19, 29-39 (1947). Together, those cases established that the "control and disposition" of the seabed is "the business of the Federal Government rather than the States." Maine I, 420 U.S. at 522.

That background rule, however, has been modified by Congress in several significant respects. Most importantly, Congress in 1953 passed the Submerged Lands Act (SLA), 43 U.S.C. § 1301 et seq., which grants to the states full title to the seabed within three geographical miles of their shores.[3] See 43 U.S.C. §§ 1301, 1311. Moreover, Congress expressly recognized that three-mile line as the official seaward boundary of the coastal states. Id. § 1312.

---

[3] The three-mile boundary is subject to certain exceptions not relevant here. E.g., 43 U.S.C. § 1301(b).

Shortly thereafter, however, Congress enacted the Outer Continental Shelf Lands Act of 1953 (OCSLA), 43 U.S.C. § 1331 et seq. A major purpose of the OCSLA was to specify that federal law governs on the "outer Continental Shelf" -- defined as all submerged lands under U.S. sovereign control lying seaward of the three-mile boundary, see 43 U.S.C. § 1331(a) -- and on any fixed structures attached to the outer Continental Shelf. Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 355 (1969); see also 43 U.S.C. § 1332 (declaring it to be "the policy of the United States that . . . the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition"). The OCSLA makes the Constitution, laws, and civil and political jurisdiction of the United States fully applicable to the outer Continental Shelf. 43 U.S.C. § 1333(a)(1). It also establishes nationwide rules for the leasing and development of natural resources in the seabed outside of state territory. Id. § 1337. Further, the OCSLA provides a federal cause of action for any person aggrieved by a violation of those rules, id. § 1349(a)(1), and grants the federal district courts jurisdiction to hear such cases, id. § 1349(b). It is, in short, a sweeping assertion of federal supremacy over the submerged lands outside of the three-mile SLA boundary. See id. § 1332 (declaring it to be "the policy of the United States that . . . the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public" (emphasis added)).

In 1975, the Supreme Court confirmed this broad understanding of the OCSLA in Maine I. The United States had brought an original complaint in the Supreme Court against thirteen states bordering the Atlantic Ocean, alleging that each state had claimed some right or title in the outer Continental Shelf that was inconsistent with federal interests. 420 U.S. at

516-17. In reply, the defendant states (including Massachusetts) had denied the United States's title in the outer Continental Shelf, asserted a variety of historical claims to the seabed beyond the SLA's three-mile boundary, and urged the Court to overrule its decisions in California, Louisiana and Texas. Id. at 517-19. The Supreme Court ruled for the United States, reaffirming that "paramount rights" in the seabed belong to the federal government as national sovereign. Id. at 524. The SLA, the Court acknowledged, had transferred title to the states in a narrow band of the seabed. But that statute did not alter the federal government's rights outside of that narrow band. Id. at 526. On the contrary, the Court explained, Congress in the OCSLA had "emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit." Id.

B. Regulation of Fishing and Marine Fisheries

With the framework for regulating the seabed thus settled, Congress in 1976 enacted the Magnuson (now Magnuson-Stevens) Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq.

Like the OCSLA, the Magnuson-Stevens Act asserts federal control over the waters outside of the three-mile limit of state jurisdiction. The Act creates a "national framework for conserving and managing marine fisheries." S. Rep. No. 104-276, at 2 (1996) (describing the history and purposes of the Act). It claims for the federal government "exclusive fishery management authority" in outer Continental Shelf waters within and beyond the United States's "exclusive economic zone," which extends approximately 197 nautical miles seaward from the

three-mile boundary of state jurisdiction.[4] See 16 U.S.C. § 1811. Within that exclusive economic zone, the Act further claims for the United States "sovereign rights . . . over all fish, and all Continental Shelf fishery resources."[5] Id. § 1811(a); see also id. § 1801(c)(1) (declaring Congress's intent "to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources").

At the same time, the Magnuson-Stevens Act establishes that the states enjoy the power to regulate fishing activities within their borders, including within the three-mile SLA boundary: "[N]othing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries."[6] 16 U.S.C. § 1856(a)(1). By so providing, Congress "confirmed state jurisdiction over fisheries within a State's internal waters and, for coastal states, out to the three-mile limit." Davrod Corp. v. Coates, 971 F.2d 778, 786 (1st Cir. 1992); see also Massachusetts ex rel Div. of Marine Fisheries v. Daley, 170 F.3d 23, 25 (1st Cir. 1999) (Magnuson-

---

[4] The Magnuson-Stevens Act does not create this "exclusive economic zone," but rather incorporates by reference the 200-nautical mile exclusive economic zone that President Reagan created by executive order in 1983. See 16 U.S.C. § 1802(11); Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 14, 1983). Congress, however, modified that zone for purposes of the Magnuson-Stevens Act, defining it to include only that portion of the original exclusive economic zone that is seaward of the SLA boundary of state jurisdiction. See § 1802(11); Massachusetts ex rel Div. of Marine Fisheries v. Daley, 170 F.3d 23, 25 (1st Cir. 1999).

[5] There is an exception, not relevant in this case, for the regulation of "highly migratory" fish species. See 16 U.S.C. § 1812.

[6] Once again, there are certain exceptions not relevant in the present case. E.g., 16 U.S.C. § 1856(b).

Stevens Act, with limited exceptions, does not apply within state territorial waters).

C. Federal vs. State Jurisdiction in Nantucket Sound

Nantucket Sound, where the disputed tower has been built, presents special difficulties in distinguishing the respective spheres of state and federal jurisdiction. Nantucket Sound is almost completely enclosed by Massachusetts's territorial sea; only at the extreme eastern end of the Sound does a channel of federal water approximately one mile wide connect it to the open ocean. But the Sound is a large body of water, and its center portion -- including the site of Cape Wind's data tower on Horseshoe Shoals -- is more than three miles from any coast.

Despite that fact, Massachusetts in the early 1970s took the position that all of Nantucket Sound, including Horseshoe Shoals, is within Massachusetts's territorial jurisdiction under the doctrine of "ancient title." The Supreme Court rejected that claim in United States v. Maine (Maine II), 475 U.S. 89 (1986), holding that the Commonwealth did not inherit title to the Sound from the British Crown. Id. at 103. After Maine II, it is incontrovertible that Cape Wind's data tower is located on the outer Continental Shelf, outside of Massachusetts's territorial jurisdiction. 43 U.S.C. § 1331(a).

But there is a complication. In 1984 -- while the Maine II litigation was pending -- Congress passed a bill defining all of Nantucket Sound to be within the "jurisdiction and authority" of Massachusetts "[f]or the purposes of" the Magnuson-Stevens Act. See Pub. L. No. 98-623, § 404(4), 98 Stat. 3394, 3408 (Nov. 8, 1984) (codified at 16 U.S.C. § 1856(a)(2)(B)). In Davrod Corp. v. Coates, supra, this court held that

§ 1856(a)(2)(B) "expressly confirms" Massachusetts's power to regulate the length of fishing vessels in Nantucket Sound. See 971 F.2d at 786. In this case, Ten Taxpayer contends that the same provision authorizes Massachusetts to regulate the construction of Cape Wind's data tower, which Ten Taxpayer claims has the potential to affect fishing and fish habitats.

III.

A. Removal

With that background in mind, we turn to Ten Taxpayer's arguments on appeal. The first question is whether the district court should have remanded this case to the Barnstable Superior Court for lack of federal subject-matter jurisdiction.[7] Our review is de novo. Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 33 (1st Cir. 1998).

Removal is permitted under 28 U.S.C. § 1441 in civil actions over which the district courts have "original jurisdiction." The Supreme Court has interpreted that requirement to bar removal unless the state action could have been filed in federal court in the first instance. Sygenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 33 (2002); Okla. Tax Comm'n v.

---

[7] Cape Wind also renews its argument that the plaintiffs lack standing to bring this suit. We disagree. A Massachusetts statute expressly allows groups like Ten Taxpayer to bring suit to enjoin environmental harms under any "statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment," Mass. Gen. Laws ch. 214, § 7A, and the plaintiffs here (all of whom reside in towns bordering Nantucket Sound and many of whom work in the Sound itself) allege sufficiently concrete and personal injuries from Cape Wind's activities to support standing. In addition, no party has suggested that the appeal is moot because the SMDS has already been built; indeed, Ten Taxpayer says that Massachusetts regulatory clearance for the project remains both available and required.

Graham, 489 U.S. 838, 840 (1989) (per curiam); see also BIW Deceived v. Local 56, 132 F.3d 824, 830 (1st Cir. 1997). Here, the most obvious bases for federal subject-matter jurisdiction are lacking: the parties are nondiverse, and Ten Taxpayer's complaint does not (at least on its face) assert a cause of action based on federal law.

The question, accordingly, is whether any of several alternative bases for subject-matter jurisdiction applies. We reject the primary argument for removal offered by Cape Wind, but find removal proper on a different ground.

1. Delegation of Regulatory Authority Under the Magnuson-Stevens Act

Cape Wind first relies on federal preemption under the Magnuson-Stevens Act. It argues that Ten Taxpayer's claims "arise under" federal law, and thus support removal under § 1441, because Ten Taxpayer cannot prevail without showing that Congress in fact granted to Massachusetts the authority to regulate on Horseshoe Shoals. This, Cape Wind argues, constitutes a "federal question" on the face of Ten Taxpayer's well-pleaded complaint under 28 U.S.C. § 1331.

We disagree. In this posture, the contention that federal law does not authorize Ten Taxpayer's claims is simply a federal preemption defense available to Cape Wind. It is hornbook law that a federal defense does not confer "arising under" jurisdiction, regardless whether that defense is anticipated in the plaintiff's complaint. Beneficial Nat'l Bank, 539 U.S. at 6; Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908). That is generally true even where the asserted defense is the preemptive effect of a federal statute. Franchise Tax Bd. v. Constr. Laborers

Vacation Tr., 463 U.S. 1, 12 (1983) (well-pleaded complaint rule may bar removal even where the only question for decision is the viability of a federal preemption defense).

Cape Wind argues that the case at bar is distinguishable from an ordinary case involving a federal preemption defense because the question is not whether Congress precluded state regulation, but whether it affirmatively permitted it. The Supreme Court rejected that precise argument in Gully v. First Nat'l Bank, 299 U.S. 109 (1936). In Gully, a state tax collector sued to collect taxes from a national bank. Id. at 111. The bank tried to remove the case, arguing that if the state government had the power to collect taxes from a national bank, it enjoyed that power only to the extent conferred by federal statute. Id. at 112. Therefore, the bank argued, removal was proper because the state tax collector necessarily relied on federal law in bringing the suit. Id. The Supreme Court rejected that reasoning:

> The argument . . . proceeds on the assumption that, because permission is at times preliminary to action, the two are to be classed as one. But the assumption will not stand . . . . Here, the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. With no greater reason can it be said to arise thereunder because permitted thereby.

Id. at 116 (citations omitted). The same reasoning applies here. No matter how the argument is framed, Cape Wind's contention that Massachusetts has no power to regulate on Horseshoe Shoals does not support removal.

2. Federal Incorporation of State Law on the Outer Continental Shelf

For an entirely different reason, however, we hold that Ten Taxpayer's claims do arise under federal law. That is because Congress has explicitly incorporated state law on the outer Continental Shelf as federal law:

> To the extent they are applicable and not inconsistent with this subchapter . . . , the civil and criminal laws of each adjacent State, now in effect or hereinafter adopted . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . . All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States.

43 U.S.C. § 1333(a)(2) (emphasis added). Interpreting this provision, the Supreme Court has held that "federal law is 'exclusive' in its regulation of this area, and . . . state law is adopted only as surrogate federal law." Rodrigue, 395 U.S. at 357; see also Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 480 (1981) ("All

law applicable to the Outer Continental Shelf is federal law, but to fill the substantial 'gaps' in the coverage of federal law, OCSLA borrows the 'applicable and not inconsistent' laws of the adjacent States as surrogate federal law.").

The consequence for Ten Taxpayer's complaint is clear. The SMDS is a "fixed structure[] erected" on the "subsoil and seabed of the outer Continental Shelf" in territory adjacent to Massachusetts. As a result, the Massachusetts statutes and regulations at issue in this case are, by federal statute, treated as federal law to the extent that they apply on Horseshoe Shoals. See Union Texas Petroleum Corp. v. PLT Engineering, Inc., 895 F.2d 1043, 1047 (5th Cir. 1990).

In its supplemental brief,[8] Ten Taxpayer opposes this interpretation of the OCSLA. It contends that § 1333(a)(2) merely specifies the rule of decision that should apply in cases brought under 43 U.S.C. § 1349(b)(1), the provision that grants the district courts subject-matter jurisdiction to hear cases arising from certain activities on the outer Continental Shelf. Moreover, Ten Taxpayer says, the OCSLA is predominantly concerned with oil and gas exploration on the outer Continental Shelf, and the Act's incorporation of state law must be understood in that context.

These arguments are unfounded. The text of § 1333(a)(2) is unequivocal: on the seabed of the outer Continental Shelf and on any fixed structures attached thereto, the "civil and criminal laws of each adjacent State . . . are declared to be the law of the United States." No reference is made to actions

---

[8] At oral argument, the court invited the parties to file supplemental briefs directed to whether 43 U.S.C. § 1333(a)(2) supports federal subject-matter jurisdiction in this case. Both parties accepted the invitation.

brought under § 1349(b)(1). On the contrary, Congress's explicit reference to state criminal laws belies any suggestion that § 1333(a)(2) merely defines the rule of decision for civil actions brought under § 1349. And Congress left no doubt that it expected the federal courts to have control over the administration of adopted state laws on the outer Continental Shelf. See § 1333(a)(2) ("All such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States.").

Likewise, nothing in § 1333(a)(2) limits the incorporation of state law to activities involved in exploring for oil and gas.[9] Nor is there any reason to infer such a limitation, as Congress had good reason to adopt state law in its entirety (except where inconsistent with federal law). Federal law is interstitial by its nature, and no other body of law applies on the outer Continental Shelf. So rather than legislate for every conceivable circumstance that might arise, Congress simply incorporated state law, thereby simultaneously retaining federal control over the outer Continental Shelf and ensuring that a comprehensive body of substantive law will be available to resolve disputes. See Gulf Offshore, 453 U.S. at 480; Chevron Oil Co. v. Huson, 404 U.S. 97, 103 (1971); Rodrigue, 395 U.S. at 357.

We hold that Ten Taxpayer's claims, though ostensibly premised on Massachusetts law, arise under the "law of the United States" under § 1333(a)(2). A federal question thus appears on the face of Ten Taxpayer's well-pleaded complaint. See 28 U.S.C. § 1331. Accordingly, the case was properly removed. Id. § 1441(b); see Hufnagel v. Omega Serv.

---

[9] We express no view as to whether other provisions of the OCSLA are so limited. That question is implicated in a related appeal pending before this court. See supra note 1.

Indus., Inc., 182 F.3d 340, 351 (5th Cir. 1999) (allowing removal because the plaintiff's state statutory claim was incorporated as federal law under the OCSLA); Hodges v. Shell Oil Co., No. Civ. A. 97-1573, 1997 WL 473809, at *3-*5 (E.D. La. Aug. 19, 1997) (same).[10]

B. Dismissal of Ten Taxpayer's Complaint

Having determined that the case was properly removed to federal court, we turn to the question whether the district court properly dismissed Ten Taxpayer's complaint under Fed. R. Civ. P. 12(b)(6). Once again, our review is de novo. Peña-Borrero v. Estremeda, 365 F.3d 7, 11 (1st Cir. 2004).

The district court dismissed the complaint on the ground that the Magnuson-Stevens Act did not grant to the Commonwealth sufficiently broad authority to regulate the construction of a tower in federal waters in Nantucket Sound. See Ten Taxpayers, 278 F. Supp. 2d at 100-01 ("Congress did not delegate its complete sovereign authority over the pocket of federal waters in Nantucket Sound to the Commonwealth, but only that part necessary to establish consistent fishing regulations throughout the Sound."). On appeal, the parties devote considerable attention to the same question. Ten Taxpayer says that by placing Nantucket Sound under the "jurisdiction and authority" of Massachusetts "for the purposes of" the Magnuson-Stevens Act, see 16 U.S.C. § 1856(a)(2), Congress must have intended to empower the Commonwealth to regulate activities on the seabed of

---

[10] Because we hold that Ten Taxpayer's claims arise directly under federal law, we do not decide whether the so-called Smith doctrine, see Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921), or the doctrine of complete preemption, see Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6-7 (2003), would support federal jurisdiction in this case.

Nantucket Sound that, like the SMDS, have the potential to affect fishing. Cape Wind responds, inter alia, that the "purposes" of the Magnuson-Stevens Act do not include regulation of structures attached to the seabed.

We frame the issue differently. Whatever Congress meant by its reference to "the purposes of" the Magnuson-Stevens Act in § 1856(a)(2),[11] the Massachusetts statutes at issue here are available on the outer Continental Shelf in any event as surrogate federal law, provided they are not inconsistent with other applicable federal law. 43 U.S.C. § 1333(a)(2). So the critical question for this court is not whether Congress gave Massachusetts the authority to regulate on Horseshoe Shoals. Rather, we must decide (1) whether the Massachusetts statutes in question apply, by their own terms, to activities on Horseshoe Shoals; and (2) if they do apply, whether their application to Cape Wind's construction of the SMDS would be inconsistent with federal law. We conclude that Ten Taxpayer's complaint falters on both grounds.

1. Scope of the Asserted Massachusetts Statutes

First, we are extremely doubtful that the Massachusetts statutes on which Ten Taxpayer relies apply to the SMDS site. Obviously, no permit was required for the SMDS if Massachusetts has not

---

[11] Congress may not have intended the phrase as a substantive restriction. Section 1856(a)(2) defines the term "jurisdiction and authority of a State." In that context, a natural interpretation of the phrase "[f]or the purposes of this chapter" is simply that Congress wanted the definition stated in § 1856(a)(2) to apply throughout the Magnuson-Stevens Act. Congress employed similar language in definitional clauses elsewhere in the Magnuson-Stevens Act. See, e.g., 16 U.S.C. § 1802(11); id. § 1821(e)(2)(A); id. § 1823(c)(2).

purported to regulate activities on that site. Ten Taxpayer asserts claims under three Massachusetts statutes: Mass. Gen. Laws chapters 91, 130, and 132A. On our reading of Massachusetts law, none of those statutes applies to the erection of a tower on Horseshoe Shoals.

In Count I of its complaint, Ten Taxpayer asserts that Cape Wind failed to comply with Mass. Gen. Laws ch. 130. Ten Taxpayer is correct that chapter 130, which regulates fishing and marine fisheries in Massachusetts, applies broadly to "all marine fisheries and fish within the jurisdiction of the commonwealth." Id. § 1. Ten Taxpayer's claim, however, arises under § 16, which is considerably more narrow: "Any occupation under this chapter of tide waters or any work done therein, shall be subject to the pertinent [permitting and licensing] provisions of chapter ninety-one."

Significantly, the term "tide waters" is not defined in chapter 130 or in the implementing regulations, and there are no published Massachusetts cases interpreting § 16. Ten Taxpayer argues that "tide waters" embraces all waters "subject to the rise and fall of the tides" -- a definition that, it says, includes Horseshoe Shoals, where Coast Guard records indicate that the sea depth varies by as much as three feet between high and low tides.

In our view, that interpretation is too broad. Massachusetts cases referring to "tide waters," "tidal waters," "tidewaters," and the like invariably concern developments in harbors or along the shoreline. See, e.g., Trio Algario, Inc. v. Comm'r of Dep't of Envtl. Prot., 795 N.E.2d 1148, 1151-53 (Mass. 2003) (discussing wharves and other occupations of "tide waters"); Boston Waterfront Dev. Corp. v. Massachusetts, 393 N.E.2d 356, 358 (Mass. 1979)

(describing "the shores of the sea" as "tidal areas"); Comm'r of Pub. Works v. Cities Serv. Oil Co., 32 N.E.2d 277, 281 (Mass. 1941) (discussing the construction of piers and wharves as the "erection of structures in tide waters"). At most, the term refers to the waters "belong[ing] to the Commonwealth." Trio Algario, 795 N.E.2d at 1153 n.9. Ten Taxpayer relies on the ancient case of Commonwealth v. Vincent, 108 Mass. 441 (1871), which opines that "tide waters" means "waters, whether salt or fresh, wherever the ebb and flow of the tide from the sea is felt." Id. at 447. On its facts, however, that case involved only the question whether a pond on the mainland qualified as "tide waters" by virtue of a narrow channel connecting it to the sea. Notwithstanding the broad dictum, we do not think Vincent supports Ten Taxpayer's sweeping notion that "tide waters" embraces any location where the depth of the sea is affected by the tides, even in waters that do not "belong" to the Commonwealth. We conclude that Mass. Gen. Laws ch. 130, § 16 is inapplicable to the SMDS site by its own terms.

In any event, even if § 16 were applicable on Horseshoe Shoals, we would still conclude that no permit was required. That is because § 16 merely subjects structures erected in the tide waters to the "pertinent provisions" of Mass. Gen. Laws ch. 91. Chapter 91 requires a license from the Massachusetts Department of Environmental Protection (DEP) for structures built in protected waters. See Mass. Regs. Code tit. 310, § 9.05(1)(a). The DEP's regulations, however, limit this licensing and permitting requirement to activities in "waterways" and "filled tidelands." Id. § 9.04. Neither of those terms, as defined in the regulations, embraces Horseshoe Shoals.[12] Consequently, Cape Wind was not obligated

---

[12] Under DEP regulations, "waterway" means "any area of water and associated submerged land or tidal flat lying below the high water mark of any navigable river or stream, any Great Pond, or

to seek a permit for its data tower under Mass. Gen. Laws ch. 91.

Finally, Ten Taxpayer asserts in Count II of its complaint that Cape Wind was required to obtain approval for the SMDS under the Massachusetts Ocean Sanctuaries Act, Mass. Gen. Laws ch. 132A. Chapter 132A expressly provides that Nantucket Sound is within the Cape and Islands Ocean Sanctuary. See id. § 13(c). With few exceptions, the statute prohibits "the building of any structure on the seabed" in any ocean sanctuary. Id. § 15. From this, Ten Taxpayer concludes that Cape Wind erected the SMDS in violation of chapter 132A.

The problem with this theory is th the Massachusetts Department of Environmental Management (DEM), which is charged with implementing the Ocean Sanctuaries Act, id. § 12C, including the "care, oversight and control" of ocean sanctuaries, id. § 14; Mass. Regs. Code tit. 302, § 5.09, has expressly disclaimed authority over Horseshoe Shoals. In a letter to counsel for Ten Taxpayer dated January 24, 2002, Myron Gildesgame, the DEM's director of the Office of Water Resources and the agency's official Ocean Sanctuaries Coordinator,[13] explained that the Cape and Islands

---

any portion of the Atlantic Ocean within the Commonwealth." Mass. Regs. Code tit. 310, § 9.02 (emphasis added). Horseshoe Shoals is not "within the Commonwealth" under the SLA, and nothing in the Magnuson-Stevens Act alters that fact. Similarly, the SMDS is not located on "filled tidelands," which are defined as "former submerged lands and tidal flats which are no longer subject to tidal action due to the presence of fill." Id.

[13] The Ocean Sanctuaries Coordinator is a position created under the DEM's regulations. See Mass. Regs. Code tit. 302, § 5.09(3). The Coordinator is charged with carrying out the responsibilities of the DEM under the Ocean Sanctuaries Act and is authorized to perform or order investigations to determine whether particular activities are consistent with chapter 132A. Id.

Ocean Sanctuary is not considered to include the Horseshoe Shoals area. Although chapter 132A purports to include Nantucket Sound in that sanctuary, that legislation was passed prior to the Supreme Court's decision in Maine II. Now, he concluded, "jurisdiction over the central portion of the Sound, including Horseshoe Shoals, is with the federal government." Gildesgame was even more explicit in response to a subsequent letter from Ten Taxpayer:

> While I appreciate your legal research . . . relative to state jurisdiction claims, the Department and the Ocean Sanctuaries Program have not claimed jurisdiction over the area of the sound which includes Horseshoe Shoals, and respectfully decline to seek to expand our current jurisdiction.

That is the end of the matter. Because the responsible Massachusetts agency has disclaimed regulatory authority over the SMDS site,[14] we hold that Cape Wind was not required to seek approval for the project under Mass. Gen. Laws. ch. 132A.

---

[14] We recognize that under DEM regulations, it is the Commissioner of the DEM and not the Ocean Sanctuaries Coordinator who is formally empowered to make determinations regarding the applicability of permit requirements to particular situations. See Mass. Regs. Code tit. 302, § 5.09(4). Nevertheless, we are satisfied that Gildesgame's letters to counsel for Ten Taxpayer represent the official position of the DEM concerning the Commonwealth's jurisdiction over Horseshoe Shoals. Ten Taxpayer has not disputed that the letters represent the agency's position. Moreover, prior to filing the instant lawsuit, Ten Taxpayer notified both the Commissioner of the DEM and the Massachusetts Attorney General of its intent to sue. See Mass. Gen. Laws ch. 214, § 7A (requiring such notice). Despite this notice, neither the Commissioner nor the Attorney General sought to intervene in this action or initiate an enforcement proceeding against Cape Wind.

2. Inconsistency with Federal Law

There is a second reason why the district court was correct to dismiss Ten Taxpayer's complaint. Even if our interpretation of state law is incorrect and one or more of the cited Massachusetts statutes does require a permit for the SMDS, there is a further question: whether that requirement should be incorporated and enforced as federal law under 43 U.S.C. § 1333(a)(2)(A). We conclude that it should not.

Under § 1333(a)(2)(A), the Massachusetts statutes cited by Ten Taxpayer apply on the outer Continental Shelf, if at all, solely as surrogate federal law. Id.; see also Gulf Offshore, 453 U.S. at 480 ("All law applicable to the Outer Continental Shelf is federal law . . . ."). But under the OCSLA, state laws are not adopted as surrogate federal law to the extent that they are "inconsistent with [the OCSLA] or with other Federal laws . . . ." Id.; see also Rodrigue, 395 U.S. at 355-56 (explaining that state law applies to fixed structures on the outer Continental Shelf "only as federal law and then only when not inconsistent with applicable federal law").

In our view, the OCSLA leaves no room for states to require licenses or permits for the erection of structures on the seabed on the outer Continental Shelf. Congress retained for the federal government the exclusive power to authorize or prohibit specific uses of the seabed beyond three miles from shore. See § 1333(a)(3) ("The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf . . . ."). If adopted and enforced on the outer Continental Shelf, statutes like Mass. Gen. Laws chs. 91 and 132A, which require the approval of

state agencies prior to construction, would effectively grant state governments a veto power over the disposition of the national seabed. That result is fundamentally inconsistent with the OCSLA. See id. § 1332(3) (declaring it to be the policy of the United States that "the outer Continental Shelf is a vital national reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs" (emphasis added)).

Ten Taxpayer contends that the Magnuson-Stevens Act, which was enacted after the OCSLA, changed this calculus by defining the "body of water commonly known as Nantucket Sound" to be within the "jurisdiction and authority" of Massachusetts. See 16 U.S.C. § 1856(a)(2)(B). Yet nothing in the Magnuson-Stevens Act purports to repeal or amend the OCSLA. Cf. Passamaquoddy Tribe v. Maine, 75 F.3d 784, 790 (1st Cir. 1996) (implied repeal of federal statutes is disfavored). On the contrary, the two statutes can readily coexist: the Magnuson-Stevens Act authorizes Massachusetts to regulate fishing-related conduct throughout Nantucket Sound, but "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon," 43 U.S.C. § 1333(a)(2)(A), remain the exclusive province of the federal government. Congress was perfectly clear in the Magnuson-Stevens Act that it did not intend to alter the rights of the United States in the outer Continental Shelf. See 16 U.S.C. § 1801(c)(1) (declaring it to be the policy of Congress in the Magnuson-Stevens Act "to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources").

We conclude that any Massachusetts permit requirement that might apply to the SMDS project is inconsistent with federal law and thus inapplicable on Horseshoe Shoals under the OCSLA. The district court did not err in dismissing Ten Taxpayer's complaint.

IV.

The judgment of the district court is **affirmed**. Costs are awarded to Cape Wind.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TEN TAXPAYER CITIZEN GROUP, et al., *
Plaintiffs, *
*
v. *
*
CAPE WIND ASSOCIATES, LLC, *
Defendant. *

ORDER

TAURO, J.,

The court hereby orders that:

1. Defendant Cape Wind Associates' Motion to Dismiss [#8] is ALLOWED.

IT IS SO ORDER.

/s/ Joseph L. Tauro
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TEN TAXPAYER CITIZEN GROUP, et al., *
Plaintiffs, *
*
v. *
*
CAPE WIND ASSOCIATES, LLC, *
Defendant. *

Civil Action No. 02-CV-12046-JLT

MEMORANDUM

August 19, 2003

TAURO, J.,

This case may well be the first skirmish in an eventual battle over the construction by Defendant, Cape Wind Associates, LLC ("Cape Wind"), of a windmill farm in Nantucket Sound. But, what is at issue here is the validity of the permit process for building a single tower in the Sound to record scientific measurements. Plaintiffs claim that the permit obtained by the builder, Cape Wind, was invalid. Cape Wind disagrees and moves for dismissal.

BACKGROUND

In late 2002, Cape Wind sought to build a temporary scientific measurement tower in an area of Nantucket Sound called Horseshoe Shoals. Horseshoe Shoals is a shallow region in the Sound more than three miles off the coasts of both Cape Cod and Nantucket. The tower, called a scientific

measurement devices station or SMDS, is intended to collect data for five years to determine if this is a feasible location for a planned permanent windmill farm. That farm would include 170 windmills and be visible from shore.

Cape Wind went through a process that culminated on August 19, 2002 in the United States Army Corps of Engineers granting a permit under § 10 of the Rivers and Harbors Act of 1889.[1] This permit, Number 199902477, contemplates building a tower rising almost 200 feet above sea level, supported by three piles driven approximately 100 feet into the sea floor. The construction site is located in water approximately thirteen feet deep.[2]

Cape Wind originally planned to begin construction on October 7, 2002. The start date was postponed because Plaintiffs sought and received a temporary restraining order from Barnstable Superior Court on September 24. Cape Wind removed the case to federal court, based on federal question jurisdiction. After the restraining order expired, Cape Wind began building the tower on October 27.

Plaintiffs claim in this suit that Cape Wind should not be allowed to construct the tower without first complying with Massachusetts' fisheries regulations. According to Plaintiffs, Chapter 91 of the Massachusetts General Laws required Cape Wind to secure a license before engaging in tower construction. Defendant moves for dismissal of Plaintiffs' suit, citing the federal government's exclusive jurisdiction over waters more than three miles from shore.

---

[1] 33 U.S.C. §§ 401 et seq.

[2] The permit references the sea floor having a MLLW elevation of negative thirteen, meaning that the average water height above the sea floor of the two low water marks during a day with two low tides is thirteen feet. Obviously, the water depth changes according to the tides.

DISCUSSION

Cape Wind now moves to dismiss Plaintiffs' complaint as a matter of law. Accordingly, the court must accept as true the facts alleged in the complaint, construe all reasonable inferences in favor of the plaintiff, and determine whether the plaintiff can recover under any cognizable legal theory.[3]

There is no factual dispute between the parties that Cape Wind has received a permit from the Army Corps of Engineers, but not a license from the Commonwealth of Massachusetts. So the essential question is one of law: whether Cape Wind's activity requires such a license. This court concludes that it does not.

As noted from the bench in open court, the two United States v. Maine Supreme Court cases[4] work together to confirm the federal government's exclusive jurisdiction over the seabed for that portion of Nantucket Sound more than three miles from the coast. Maine I set forth the principle that the seabed of the Atlantic Ocean within the United States' territorial waters, but more than three miles from shore, is under exclusive federal jurisdiction.[5] Maine II made clear that the pocket of Nantucket Sound outside the three mile coastal zone, including Horseshoe Shoals, is subject to this general rule.[6] Plaintiffs do not contest this conclusion.

But Plaintiffs argue that, for certain purposes, the federal government ceded its jurisdiction over the pocket of federal waters in Nantucket Sound to Massachusetts. Specifically, Plaintiffs claim that the

---

[3] See Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 16 (1st Cir. 1998).

[4] 420 U.S. 515 (1975) (Maine I) and 475 U.S. 89 (1986) (Maine II).

[5] Maine I, 420 U.S. at 522.

[6] Maine II, 475 U.S. at 959-60.

1983 amendment to the Magnuson-Stevens Fishery Conservation and Management Act[7] delegated regulatory authority over the care of the entire Nantucket Sound fishery to the Commonwealth. The Magnuson Act, as amended in 1983, states:

> For the purposes of this chapter . . . the jurisdiction and authority of a State shall extend – (A) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States . . .; [and] (B) with respect to the body of water commonly known as Nantucket Sound, to the pocket of water west of the seventieth meridian west of Greenwich.[8]

Plaintiffs cite Title 310 of the Code of Massachusetts Regulations as the Commonwealth's use of this authority: "[A]n application for license or license amendment shall be submitted to the Department for . . . any construction, placement, excavation, addition, improvement, maintenance, repair, replacement, reconstruction, demolition, or removal of any fill or structures not previously authorized, or for which a previous grant or license is not presently valid."[9]

Plaintiff's argument ignores the limits inherent to the Magnuson Act. The section that Plaintiffs understand as a delegation of federal jurisdiction begins with language of limitation.[10] Congress did not delegate its complete sovereign authority over the pocket of federal waters in Nantucket Sound to the

---

[7] 16 U.S.C. 1800 et seq.

[8] 16 U.S.C. 1856(a)(2).

[9] Mass. Regs. Code tit. 310, § 9:05(a).

[10] See 16 U.S.C. § 1856(a)(2) (delegating authority over Nantucket Sound to Commonwealth "[f]or the purposes of this chapter").

Commonwealth, but only that part necessary to establish consistent fishing regulations throughout the Sound. As Cape Wind points out in its papers, the Act regulates who may fish,[11] by what means they may fish,[12] and how much they may fish.[13]

And so, with respect to fishing in the limited area of Nantucket Sound, the Commonwealth has exclusive regulatory jurisdiction.[14] But, nothing in the Act supports the proposition that regulating non-fishing activities simply for the protection of fish falls under the Commonwealth's jurisdiction.

Had Congress intended to entrust Massachusetts with the task of policing the entire Nantucket Sound for environmental disturbances that could impact fishing, it would have done so. Instead, Congress used limiting language, compelling the conclusion that Massachusetts has no jurisdiction to regulate the construction of a scientific research tower in federal waters. In the absence of this jurisdiction, the Commonwealth cannot require a license, and Plaintiffs' claim fails.

CONCLUSION

As the construction of a scientific testing tower does not fall within the Commonwealth's jurisdiction to regulate fisheries, no license from the Commonwealth was required. Plaintiffs' case, therefore, is DISMISSED.

AN ORDER WILL ISSUE.

/S/ Joseph L. Tauro
United States District Judge

---

[11] 16 U.S.C. §§ 1821-24.

[12] 16 U.S.C. §§ 1826-1826g.

[13] 16 U.S.C. §§ 1851-1854.

[14] See Davrod v. Coates, 971 F.2d 778, 786-87 (1st Cir. 1992).

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 02-2526

TEN TAXPAYER CITIZENS GROUP, ET AL.,
Plaintiffs, Appellants,

v.

CAPE WIND ASSOCIATES,
Defendant, Appellee.

Before
Boudin, Chief Judge,
Lipez and Howard, Circuit Judges.

JUDGMENT

Entered: January 31, 2003

The appeal from the order denying plaintiffs' motion to remand this action to state court is dismissed for lack of appellate jurisdiction. BIW Deceived v. Local S6, 132 F.3d 824, 829 (1st Cir. 1997); Estate of Bishop v. Bechtel Power Co, 905 F.2d 1272, 174 (9th Cir. 1990); Polyplastics, Inc. v. Transconex, Inc., 713 F.2d 857, 877 n. 2 (1st Cir. 1983).

Dismissed.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk

[cc. Messrs: Spillane and Dacey]

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN THE MATTER OF: Case: 1:02-cv-12046

Judge Joseph L. Tauro – pre

Ten Taxpayer Citizen – plaintiff

v.

Cape Wind Associates – defendant

NOTICE OF ACTION BY THE COURT

Notice To:

John W. Spillane, Esq.
23 Institute Road
Worcester, MA 01609

**

The following ruling was made on 11/14/02 and entered on the docket:

Judge Joseph L. Tauro . Endorsed Order entered denying [5-1] motion to remand . [EOD Date 11/15/02]

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TEN TAXPAYER CITIZENS GROUP, et al.,

Plaintiffs,

v. Civil Action No.

CAPE WIND ASSOCIATES, LLC,

Defendant.

NOTICE OF REMOVAL

Defendant Cape Wind Associates, LLC ("Cape Wind") hereby files this Notice of Removal pursuant to 28 U.S.C. § 1441(b). In support of this Notice, Cape Wind states as follows:

1. On or about October 16, 2002, Plaintiffs filed a Verified Complaint for Declaratory and Injunctive Relief (the "Complaint") against Cape Wind in the Barnstable Superior Court, Department of the Trial Court, Commonwealth of Massachusetts. The action was assigned Civil Action No. BACV2002-00645. The Complaint, a copy of which is attached hereto as Exhibit A, was served on Cape Wind on or about October 17, 2002.

Allegations of the Complaint

2. On August 19, 2002, the Army Corps of Engineers ("Army Corps") issued a permit to Cape Wind, authorizing the construction of a scientific

measurement devices station (the "SMDS") on Horseshoe Shoals, in Nantucket Sound (the "SMDS Site"). (Complaint, p. 1.)

3. The Complaint alleges that Cape Wind should have also obtained permits for the SMDS from Massachusetts state agencies because even though the decision of a *federal* court – the United States Supreme Court's decision in United States v. Maine, 475 U.S. 89 (1986) – establishes that the SMDS Site is beyond the Commonwealth's jurisdiction (Complaint ¶ 12), a *federal* statute (the Magnuson Act, 16 U.S.C. § 1856(a)(2)(B)), and the decision of another *federal* court (Davrod v. Coates, 971 F.2d 778 (1st Cir. 1992)), delegate jurisdiction over the Horseshoe Shoals to the Commonwealth of Massachusetts (Complaint ¶¶ 6, 13, 17, 37, 44).

4. Cape Wind disputes Plaintiffs' allegation that the Magnuson Act and Davrod v. Coates somehow overturn United States v. Maine and delegate jurisdiction to the Commonwealth. This will be the central issue in the case.

This Case is Removable

5. Because a federal question appears on the face of the Complaint, this action is one "arising under the Constitution, laws, or treaties of the United States," and is within the original jurisdiction of this Court. See 28 U.S.C. § 1331. Therefore, this action may be removed pursuant to 28 U.S.C. § 1441(a) and (b).

6. Even had Plaintiffs failed to cite United States v. Maine, the Magnuson Act, or Davrod v. Coates on the face of their Complaint, there would still be federal question jurisdiction, for two reasons. First, because the state law claims alleged in the Complaint require the resolution of a substantial question of federal law (i.e., whether the federal government has exclusive jurisdiction over the SMDS Site under United States v. Maine, or whether the federal government had

delegated its authority pursuant to the Magnuson Act). See Almond v. Capital Properties, Inc., 212 F.3d 20, 23 (1st Cir. 2000) (federal question jurisdiction "exists where, regardless of whether federal or state law creates the claim, a well-pleaded complaint necessarily 'requires resolution of a substantial question of federal law'"; Patterson v. Omnipont Communications, Inc., 122 F.Supp.2d 222, 224 & n.1 (D. Mass. 2000) (federal jurisdiction exists "even though Plaintiffs assert violations of state, not federal law," where federal Telecommunications Act of 1996 determined applicability of state zoning act's procedural requirements); Heineken Technical Services, B.V. v. Darby, 103 F.Supp.2d 476, 477-479 (D. Mass. 2000) (although complaint alleged state law claims, there was federal court jurisdiction because those claims raised important federal patent questions).

7. Second, there would be federal question jurisdiction under the doctrine of complete preemption, which provides: "[w]here a claim, though couched in the language of state law, implicates an area of federal law for which Congress intended a particularly powerful preemptive sweep, the cause is deemed federal no matter how pleaded." Danca v. Private Health Care Systems, Inc., 185 F.3d 1, 4 (1st Cir. 1999). See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987) (same); 13B Wright & Miller § 3566 (same). State law claims concerning the permitting of construction at the SMDS Site are preempted; federal law applies exclusively. See United States v. Maine, 475 U.S. 89 (1986) (rejecting Massachusetts' claim that Nantucket Sound should be treated as "inland waters"); United States v. Maine, 420 U.S. 515 (1975) (United States has sovereign rights to sea bed beyond three-mile limit); United States v. Maine, 423 U.S. 1 (1955) (final decree declaring rights of United States). See also 43 U.S.C.

§ 1332(1) (declaring jurisdiction of United States over sea bed beyond three-mile limit).

8. No previous application for the removal of this action has been made.

9. Within 30 days hereof, Cape Wind will file certified or attested copies of all records, proceedings, and docket entries in the Barnstable Superior Court pursuant to Local Rule 81.1.

For the foregoing reasons, Defendant Cape Wind Associates, LLC requests that this action be entered upon the docket of this Court and, upon filing a copy of this Notice with the Clerk of the Barnstable Superior Court, Department of the Trial Court, Commonwealth of Massachusetts, that the Barnstable Court shall proceed no further.

Signed pursuant to Rule 11 of the Federal Rules of Civil Procedure.

CAPE WIND ASSOCIATES, LLC,

By its attorneys,

/s/

Timothy J. Dacey, BBO #111800
Michael D. Vhay, BBO #566444
Brian Kaplan, BBO #639922
HILL & BARLOW,
A Professional Corporation
One International Place
Boston, MA 02110
(617) 428-3000

Dated: October 21, 2002
QQ6701_.DOC(878791 v. 1)

CERTIFICATE OF SERVICE
I hereby certify that a true copy
of the above document was
served upon the attorney of
record for each other party by fax
and mail on 10/21/02
/s/_____

COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss. Barnstable Superior Court
Department of the Trial Court
Civil Action No.

TEN TAXPAYER CITIZENS GROUP)
PURSUANT TO M.G.L. c.214, §7A;)
CAPE COD MARINE TRADES ASSOCIATION, INC.;)
RAOUL D. ROSS AND THE MASSACHUSETTS)
BOATING AND YACHT CLUBS ASSOCIATION, INC.)
)
PLAINTIFFS)
)
VS.)
)
CAPE WIND ASSOCIATES, LLC)
)
DEFENDANTS)

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

The Defendant, Cape Wind Associates, LLP ("Cape Wind"), has commenced erection of a 197' Scientific Data Collection Tower ("Data Tower") pursuant to Permit #199902477 ("Permit"), which was issued by the United States Army Corps of Engineers ("Corps") on August 19, 2002. Although the Plaintiffs do not comment on the validity of the Corps issuance of the Permit, the Plaintiffs assert that Cape Wind has failed to seek additional and appropriate approval from Massachusetts administrative agencies.

Pursuant to the Magnuson Fishery Conservation and Management Act ("MFCMA") 16 U.S.C.

§1856(a)(2)(A)(B), the federal government has expressly ceded regulatory and administrative authority over the fishing habitats and fishing resources in Nantucket Sound.

The Commonwealth's statutory arms to administer and regulate these concerns are M.G.L. c.130, regarding Marine Fish and Fisheries, and M.G.L. c.132A, §13-18, the Cape and Island Sanctuary Law (CISL). Each statute would require that Cape Wind seek appropriate approval from various state agencies.

Plaintiff Ten Taxpayers Citizens Group ("Ten Taxpayers"), organized pursuant to M.G.L. c.214, §7A, seeks to address a violation of these relevant statutes.

Additional plaintiffs in this suit include an individual and two Associations, all of whom are aggrieved by the Defendant's erection of a Data Tower on Horseshoe Shoals.

PARTIES

1. The Plaintiff, Ten Taxpayer Citizen Group is organized under M.G.L. c.214, §7A, in order to address imminent damage to the environment by seeking equitable or declaratory relief. The members of the Ten Taxpayers Group are:

Morris I. Johnson, Jr.,
Chairman
113 Jefferson Avenue
West Yarmouth, MA 02664

Liam Monahan
29 Lakeview Drive
Centerville, MA 02632

Timothy K. Lovelett
11 Homestead Lane
Yarmouth Port, MA 02675

Charles Hutchinson
97 Pine Point Drive
Centerville, MA 02632

Loring W. Wordell, Jr.
208 Lincoln Road
Hyannis, MA 02601

Elizabeth A. Wordell
208 Lincoln Road
Hyannis, MA 02601

Edward F. Lewis
97 Edgewater Drive East
East Falmouth, MA 02536

Steven A. Nims
22 Eldridge Road
S. Yarmouth, MA 02664

Charles A. Whitcomb
88 Greenwood Avenue
Hyannis, MA 02601

Linda M. Whitcomb
88 Greenwood Avenue
Hyannis, MA 02601

Dean F. Meehan
61 Channel Point Road
Hyannis, MA 02601

Each member resides in Barnstable County and has great familiarity with the Horseshoe Shoals and Nantucket Sound and has economic, as well as environmental interests in preserving the integrity of the seabed, water and air space over the said Shoals.

2. Plaintiff, Raoul D. Ross ("Ross") is an individual residing at 140 Buckwood Drive, Hyannis, MA 02601. For 52 years he has worked as a commercial fisherman in Nantucket Sound. He is the principal and owner of two corporations, Shannon, Inc., and Carole R., Inc. both of which employ a total of seven employees. These corporations operate three vessels, including the "Jessica and Susan", and the "Carole R.". Ross directs his fishing business on the Horseshoe Shoals, where he fishes for squid and flounder and other fish. He utilizes dragging equipment on the said Shoals, along with scup pots. Ross is the President of the Massachusetts Fishermens Association, Inc. which is headquartered in Sandwich, MA and consists of approximately 80 members. Ross will be adversely affected, personally and economically and through the corporations in which he operates his fishing business as the result of the construction of the Data Tower. It

poses an intolerable risk and danger to his ability to navigate prudently in the area of the proposed Data Tower. The construction of the proposed tower will have an adverse impact on the fishing resources located in the Horseshoe Shoals. Furthermore, the construction of the Data Tower poses an unusual hazard to navigation which will vitally affect Ross and his employees in as they conduct fishing operations which include the dragging of nets, the placement of weirs on the seabed, and other procedures designed to efficiently target the fish for capture. The construction of the Data Tower will result in depleted stocks of fish in the area and result in a great loss of economic revenue. The proposed tower impedes Ross' ability and right fish and navigate freely in the Commonwealth Tidelands.

3. The Plaintiff, Cape Code Marine Trades Association, Inc. ("CCMTA"), is a Massachusetts trade association organized under M.G.L. c.180 with a usual place of business at P.O. Box 445, Harwich Port, MA 02646. CCMTA, has 103 members. Many of its members have marina facilities located on the Cape and Island Sanctuary coast, which sell, service and berth motor boats and vessels for their customers. These customers include sports fishermen and recreational boating users who use the subject area at Horseshoe Shoals for fishing and recreational boating. The proposed Data Tower will pose a substantial threat to the navigation of these boats through the Main Channel. Its tripodal base will also cause substantial injury and damage to the sea bed and impede the sea bed's function as a natural habitat for fisheries and wildlife. The members of CCMTA fear that the proposed tower will cause their customers

to seek alternate coastal locations and vendors in order to avoid the tower as it threatens their navigation and fishing. See Affidavit of Peter R. Way, President of CCMTA - Exhibit 1.

4. The Plaintiff, Massachusetts Boating and Yacht Clubs Association, Inc. ("MBYCA") is a Massachusetts association organized under M.G.L. c.180, with a usual place of business at 173 Glenellen Road, Boston, MA 02132-5706. This association consists of 79 boating and yacht clubs, which claim as their membership 75,000 persons. This membership operate sports fishing and other recreational vessels in and around Horseshoe Shoals. Any of this membership operating vessels with a draft of 6' or more will have difficulty operating on the southwest side of Horseshoe Shoals, adjacent to the Main Channel where at low tide the depth can be as low as 1'-2' of water. In sum, these Association members and their counterparts will be adversely affected by the erection of the Data Tower in the tight waters of the Horseshoe Shoals where such tower will occupy in excess of 900 square feet of space near the Main Channel. See Affidavit of Marie M. Rinfret, Commodore - Exhibit 2.

5. The Defendant, Cape Wind Associates, LLC, ("Cape Wind") is a Limited Liability Corporation, with a usual place of business at 1 Atlantic Avenue, South Yarmouth, MA 02664.

JURISDICTION

6. The MFCMA 16 U.S.C. §1856(a)(2)(A)(B) states:

"(2) for the purpose of this chapter, except as provided in subsection (b) of this section the jurisdiction and authority of a state shall extend--

(A) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States pursuant to the Geneva Convention on the territorial sea and contiguous zone or any successor convention to which the United States is a party.

(B) with respect to the body of water commonly known as Nantucket Sound, to the pocket of water west of the seventieth meridian west of Greenwich..."

This provision explicitly cedes administrative and regulatory authority to Massachusetts for purposes related to the "conservation and management of fishery resources." 16 U.S.C. §1801(c). **Davrod v. Coates**, 197 F.2d 778 (1st Cir. 1992) supports the clear intention of the MFCMA.

7. The Barnstable Superior Court has jurisdiction over this action pursuant to M.G.L. c.214, §7A (Environmental Ten Taxpayer Citizen Suit Authorization), and M.G.L. c.231A, §1-9, which provide a statutory basis for Declaratory Relief for violations of M.G.L. C. 130, and M.G.L. c.132A, §13-18 (CISL).

VENUE

8. M.G.L. c.214 §7A establishes venue in Barnstable Superior Court where the violation of the relevant statutes (M.G.L. C. 130, and M.G.L. c.132A, §13-18 (CISL)) will occur off of the Coast of Mashpee, Cotuit, and Osterville. The Ten Taxpayers have complied with M.G.L. c.214 §7A by noticing the State Environmental Agencies by certified mail that they intended to bring their suit in this Court and request a temporary restraining order to prevent Cape Wind from erecting the proposed Data Tower.

STATEMENT OF FACTS

9. The erection of the Data Tower is connected with and will be the first step of a proposed industrial energy facility. The proposed industrial energy facility will consist of 170 windmills, each measuring 470' in height. The proposed energy facility will occupy 28 square miles of Nantucket Sound in the area of the Horseshoe Shoals.

10. The United States Army Corps of Engineers issued Permit #199902477 ("Permit") to Cape Wind on August 19, 2002. The Plaintiffs' Verified Complaint makes no comment on the validity of the issuance of such Permit.

11. The Permit authorized the construction of a pile-supported scientific measuring Data Tower extending over 200' in the air, 13' above the mean low water mark elevation in Nantucket Sound, at the southwest side of the Horseshoe Shoals, adjacent to the South Main Channel. See Nautical Map (Exhibit 3) of the South Main Channel, Horseshoe Shoals in Nantucket Sound and the proposed Data Tower location. The ocean waters in this location are 13' in depth or less. The proposed tower is supported by three steel pilings, each 36" in diameter, each to be driven approximately 100' into the ocean sea bed. The proposed tripodal supports will occupy 900 square feet of water space.

12. Horseshoe Shoals and the location of the proposed Data Tower fall under the jurisdiction of the United States according to **United States v. Maine**, 475 U.S. 89 (1986) and the three mile limit articulated therein. Although Horseshoe Shoals falls under United States jurisdiction, it is surrounded on all sides by waters which fall under the jurisdiction of the Commonwealth of Massachusetts.

13. The MFCMA, 16 U.S.C. §1856(a)(2)(A)(B), gives the Commonwealth of Massachusetts the power to regulate the United States waters within Nantucket Sound for purposes related to the **"conservation and management of fishery resources"** 16 U.S.C. §1801(c).

14. The Commonwealth's statutory arm to regulate the conservation and management of fishery resources is .M.G.L. C. 130 and regulations thereunder.

15. The Commonwealth's second statutory arm to regulate the conservation and management of fishery resources is M.G.L. c.132A, §13-18 (CISL).

16. M.G.L. C. 130 §1 (emphasis added) states that M.G.L. C. 130 as well as the rules and regulations promulgated by the Division of Marine Fisheries, **"apply to all marine fisheries and fish *within the jurisdiction of the commonwealth.*"**

17. Since the MFCMA cedes to the Commonwealth the power over the conservation and management of fishery resources to the waters located within Horseshoe Shoals, the provisions of M.G.L. C. 130 regulate these waters for that purpose.

18. The Commonwealth's Coastal Fisheries Conservation and Management, 322 CMR 8:02 under M.G.L. C. 130 reflect the MFCMA's cede of power in defining Nantucket Sound as:

> **"all waters which are within an area encompassed by a straight line down from the Great Point of Nantucket to Mononomy Point in Chatham; thence following the shoreline to Succonnosett Point in Mashpee; thence following a straight line to Cape Pogue in Edgartown; thence following a straight line to Madaket Point in Nantucket; thence following**

the shoreline to Great Point in Nantucket."

19. M.G.L. C. 130 §16 states, **"any occupation under this Chapter of tide waters or any work done therein, shall be subject to the pertinent provisions of Chapter ninety-one."**

20. With an average tide of 3 feet, Horseshoe Shoals is contained within **"tide waters"** as the term is has been interpreted in dicta by the Massachusetts Supreme Judicial Court. **Commonwealth v. Vincent**, 108 Mass 441, 447 (1871). The **Vincent** Court interpreted **"tide waters"** to be synonymous with "navigable waters" or waters **"wherever the ebb and flow of the tide from the sea is felt."**

21. M.G.L. C. 130 §16 establishes its own jurisdiction to license and permit activities in Horseshoe Shoals using the permitting procedures contained within M.G.L. c.91. Indeed, M.G.L. c.130 subjects all of Nantucket Sound to M.G.L. c.91 permitting requirements under the state's marine management authority. As **M.G.L. C. 130 §16** contains its own independent basis for jurisdiction for all of the waters contained within Nantucket Sound, this Court need not examine **M.G.L. C. 91** to interpret whether it would provide state jurisdiction standing alone.

22. 310 C.M.R. 9.03, establishes the scope of the Department of Environmental Protection's permitting jurisdiction under Chapter 91. It provides:

"Written authorization in the form of a license, permit, or amendment

thereto must be obtained from the DEP before the commencement of one or more of the activities specified in 310 C.M.R. 9.03(2) and (3) or 310 C.M.R. 9.05...

23. 310 C.M.R. 9.05 provides in relevant part:

"Except as provided in 310 C.M.R. 9.05(3) an application for a license or license amendment shall be submitted to the Department for the following activities involving work on or use of fill or structures:

> **(a) Any construction, placement, excavation, addition, improvement, maintenance, repair, replacement, reconstruct-tion, demolition or removal of any fill or structures not previously authorized or for wich a previous grant or license is not presently valid."**

24. The erection of the Data Tower without a permit properly issued in accordance with M.G.L. c.130 and the specific provisions outlined in M.G.L. c.91 will result in a violation of M.G.L. c.91, §23 which would make such Tower a nuisance per se. M.G.L. c.91, §23 states:

"Every erection made and all work done within tide water... not authorized by the general court or by the department, if a license is required as hereinfore provided, shall

be considered a public nuisance. Whoever creates such nuisance, (a) shall be punished by a fine of not more than twenty-five thousand dollars for each day such nuisance occurs or continues., or by imprisonment for not more than one year, or both by such fine and imprisonment; or (b), shall be subject to a civil penalty of not more than twenty-five thousand dollars for each day such nuisance occurs or continues. The attorney general or the district attorneys within their respective district shall, at the request of the department, institute proceedings to enjoin or abate such nuisance, or to restrain the removal of material from any bar or breakwater of any harbor."

25. M.G.L. c.132A, §12C (CISL)states **"The department {DEM} shall integrate its implementation, administration and enforcement of the act with other programs for the protection of the public health, safety, welfare and the environment."** CISL §12C would require the administration and regulation of Nantucket Sound to be integrated with the regulatory framework of M.G.L. c.130 and its administration over fisheries conservation and management.

26. M.G.L. c.132A, §14 (CISL) states that the DEM has care, control, and oversight over the Cape and Island Sanctuaries and is empowered to protect the same from **"any exploitation, development or activity that would significantly alter or otherwise endanger the**

ecology or appearance of the ocean, seabed, or subsoil or the Cape Cod Natural Seashore".

27. M.G.L. c.132A, §15 (CISL) states: **"Except as otherwise provided herein, the following activities shall be prohibited in an ocean sanctuary: the building of any structure on the seabed or under the subsoil..."**

28. M.G.L. c.132A, §16 (CISL) provides limited exceptions to CISL §15. One such exception under which the Data Tower could arguably be included is, **"temporary educational and scientific activities jointly permitted by appropriate state agencies."** No such additional permitting has been undertaken pursuant to CISL §16.

29. M.G.L. c.132A, §16 (CISL) recognizes that the Department of Fisheries plays a role in approving activities in Nantucket Sound. It allows:

> **"the harvesting and propagation of fish and shellfish in all forms so long as the DEM and the Department of Fisheries, Wildlife and Environmental Law enforcement are satisfied that such activities are carried on in accordance with sound conservation practices, . . ."**

30. Plaintiffs assert that the data sought by Cape Wind pursuant to wind velocity and direction,

the nature of the sea at the Horseshoe Shoals and the seabed of the Shoals and any other pertinent data thereof can readily be obtained through other sources.

31. The "Cross Rip" light ship traversed the Horseshoe Shoals for over 100 years and collected the exact wind data now sought. Only budget problems ceased the compilation of this reliable wind data when the Coast Guard was forced to curtail its mission in 1964. See Affidavit of Captain Barry O. Fuller, Exhibit 4, ¶28. This collected weather data is readily obtainable in the Archives of the U.S. Congress. See Affidavit of Captain Barry O. Fuller, Exhibit 4, ¶28.

32. Available wind velocity is obtained in and around the Horseshoe Shoals on a daily basis by the Captains of the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority vessels. Such data is reported to the Brandt Point Coast Guard Station at 7:30 a.m., 1:00 p.m., 6:00 p.m. and 9:30 p.m. Such reports have been made on a year-round basis each day from the early 1990s. See Affidavit of Captain Barry O. Fuller Exhibit 4, ¶28. Such data is also collected by the Captains operating Hy Line Vessels (See Affidavit of Murray R. Scudder - Exhibit 5).

33. Cape Wind could collect the same data with no environmental impact by employing tethered weather balloons at Horseshoe Shoals. See Affidavits of Ten Taxpayer Citizens Chairman, Captain Morris I. Johnson, Jr. - Exhibit 6 - and Captain Barry O. Fuller Exhibits 4.

34. The Woods Hole Oceanographic Institute, a nationally renowned marine scientific gathering institute, can provide remote environmental monitoring devices which can sea map the Horseshoe Shoals and obtain all kinds of navigational information and necessary data concerning the seabed and the environs of the Horseshoe Shoals. See Affidavit of Captain Barry O. Fuller, Exhibit 4, ¶25.

35. The Coastal Pilot Treatise in Vol. II, which covers coastal information from Maine to New York, including Nantucket Sound, provides voluminous data concerning the kinds of meteorological information pertaining to Nantucket Sound and which has been compiled by experts over the years who have knowledge of the seacoast areas.

COUNT I

36. The Plaintiffs hereby incorporate ¶1 through ¶37 as if fully set forth herein.

37. Massachusetts has been granted regulatory and administrative duties over the waters of Nantucket Sound pursuant to MFCMA.

38. Cape Wind disregarded M.G.L. c.130, §16, titled Massachusetts Fisheries, which states that any occupation of tide waters or any work therein shall be subject to the pertinent provisions of M.G.L. c.91.

39. M.G.L. c.130, §16 provides an independent jurisdictional requirement that Cape Wind's Data Tower by permitted according to the procedures of Chapter 91.

40. Cape Wind has violated M.G.L. c.130, §16 by failing to obtain a Chapter 91 license for the Data Tower.

41. Plaintiffs are aggrieved by Cape Wind's failure to obtain a Chapter 91 License which is a violation of M.G.L. c.130. Relief of such violation is granted through enjoining such activities pursuant to M.G.L. c.91 §23 and M.G.L. c.214 §7A.

COUNT II

42. The Plaintiffs hereby incorporate ¶1 through ¶44 as if fully set forth herein.

43. Cape Wind disregarded M.G.L. c.132A CISL by not seeking appropriate permits, certificates, licenses and approvals required by law.

44. Massachusetts has been granted regulatory and administrative duties over the waters of Nantucket Sound pursuant to MFCMA. CISL's framework protects the fragile ecological environment of Nantucket Sound by strictly curtailing the erection of structures in these waters. Although some structures may be erected in the waters of Nantucket Sound subject to proper state-imposed permitting, the proposed Data Tower does not fit any of the exceptions.

45. Plaintiffs are aggrieved by Cape Wind's failure to obtain appropriate approval of state agencies as required by M.G.L. C.132A. Appropriate relief for a violation of M.G.L. C.132A may be granted by enjoining pursuant to M.G.L. c.214 §7A Cape Wind's activities in erecting its Data Tower.

REQUEST FOR RELIEF

Wherefore, the Ten Taxpayers Citizen Group pursuant to M.G.L. c.214, §7A, and all of the named Plaintiffs pursuant to M.G.L. c.231A, §1-9, respectfully request this Honorable Court to:

A. To issue a Temporary Restraining Order under M.R.Civ.P. 65(a) against Cape Wind and adjudge and declare that Cape Wind is in violation of M.G.L. c.132A, §12-18 and M.G.L. c.130, §16 and regulations pursuant thereto. Failure to apply for and receive appropriate permits including a Chapter 91 permit for Cape Wind's Data Tower created a public nuisance per se pursuant to M.G.L. C.91 §23 as enforced by M.G.L. c.130, §16.

B. To issue a Preliminary Injunction against Cape Wind and adjudge and declare that Cape Wind is in violation of M.G.L. c.132A, §12-18, M.G.L. c.130 §16 and regulations pursuant thereto. Failure to apply for and receive appropriate permits including a Chapter 91 permit for Cape Wind's Data Tower created a public nuisance per se pursuant to M.G.L. C.91 §23 as enforced by M.G.L. c.130, §16.

C. To issue a Permanent Injunction against Cape Wind and adjudge and declare that Cape Wind is in violation of M.G.L. c.132A, §12-18, M.G.L. c.130, §16 and regulations pursuant thereto.

D. To order Cape Wind to observe such Orders. In the event that this Court is unable to consider a preliminary

injunction within ten days of issuing a TRO, and Cape Wind elects to proceed with construction of its Data Tower, then separate from this Court's TRO, this Court should order that Cape Wind shall be fined $25,000.00 per day for every day the said Data Tower remains erected in any way pursuant to M.G.L. c.91, §23.

E. To grant such other and further immediate relief as this Honorable Court deems just and appropriate to protect and enforce the public interest pursuant to this first in the nation Data Tower as the first step in a windmill farm proposal in the waters of the Horseshoe Shoals in Nantucket Sound.

TEN TAX PAYER CITIZENS GROUP PURSUANT TO M.G.L. c.214, §7A; CAPE COD MARINE TRADES ASSOCIATION, INC.; RAOUL D. ROSS AND THE MASSACHUSETTS BOATING AND YACHT CLUBS ASSOCIATION, INC.

By:_____

John W. Spillane, Their Attorney
Spillane & Spillane, LLP
23 Institute Road
Worcester, MA 01609
(508) 756-4342
BBO #475420

Dated: October 16, 2002

COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss. Barnstable Superior Court
Department of the Trial Court
Civil Action No.

TEN TAXPAYER CITIZENS GROUP)
PURSUANT TO M.G.L. c.214, §7A;)
CAPE COD MARINE TRADES ASSOCIATION, INC.;)
RAOUL D. ROSS AND THE MASSACHUSETTS)
BOATING AND YACHT CLUBS ASSOCIATION, INC.)
)
PLAINTIFFS)
)
VS.)
)
CAPE WIND ASSOCIATES, LLC)
)
DEFENDANT)

VERIFIED AFFIDAVIT

I, Morris I, Johnson, Jr. of 113 Jefferson Avenue, W. Yarmouth, MA 02664, hereby depose and state as follows:

1. I am the Chairman of the Ten Taxpayers Citizens Group, pursuant to M.G.L. c.214, ¶7A, and I have read the Complaint filed on behalf of such group, and other plaintiffs

2. I affirm knowledge of the facts contained therein and affirm that they are true.

Signed under the pains and penalties of perjury this 16th day of October, 2002.

/s/
Morris I. Johnson, Jr.

(2)

DEC 2 2 2004

No. 04-684

IN THE

Supreme Court of the United States

TEN TAXPAYER CITIZENS GROUP, ET AL.,

Petitioners,

v.

CAPE WIND ASSOCIATES, LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD W. RENEHAN
Counsel of Record
GOULSTON & STORRS
A Professional Corporation
400 Atlantic Avenue
Boston, Massachusetts 02110
(617) 482-1776

Of Counsel:

TIMOTHY J. DACEY
KURT W. HAGUE
GOULSTON & STORRS
A Professional Corporation

Dated: December 22, 2004

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

CORPORATE DISCLOSURE STATEMENT

This Brief in Opposition is submitted on behalf of Cape Wind Associates, LLC ("Cape Wind"). Cape Wind has no parent corporation and no publicly traded company owns 10% or more of its stock.

[This page is intentionally left blank.]

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

THE LAW GOVERNING NANTUCKET SOUND 5

a. Regulation of the Seabed 5

b. Regulation of Fisheries 6

SUMMARY OF ARGUMENT 9

ARGUMENT 10

I. THE FIRST CIRCUIT'S INTERPRETATION OF OCSLA IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS AND WITH THE PURPOSES OF OCSLA AS DECLARED BY CONGRESS. 10

II. THE TEN TAXPAYERS HAVE FAILED TO SHOW THAT THE FISHERY ACT IMPLIEDLY REPEALED THE PROVISIONS OF OCSLA GOVERNING THE SEABED OF NANTUCKET SOUND. 13

III. MASSACHUSETTS HAD AMPLE OPPORTUNITY TO ENFORCE ITS OWN STATUTES, BUT CHOSE NOT TO, BECAUSE THE STATUTES DO NOT APPLY. 16

CONCLUSION 17

APPENDIX 1a

TABLE OF AUTHORITIES

CASES:

Beneficial National Bank v. Anderson,
539 U.S. 1 (2003) 4

Gulf Offshore Oil Co. v. Mobil Oil Corp.,
453 U.S. 473 (1981) 11

Hodges v. Shell Oil Co., 1997 WL 473809
(E.D.La. Aug.19, 1997) 11

Hufnagel v. Omega Serv. Indus., Inc.,
182 F.3d 340 (5th Cir. 1999) 11

J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred
Int'l, Inc., 534 U.S. 124 (2001) 13

Morton v. Mancari,
417 U.S. 535 (1974) 13

Rodrigue v. Aetna Casualty & Surety Co.,
395 U.S. 352 (1969) 11

Smith v. Kansas City Title and Trust Co.,
255 U.S. 180 (1921) 4

Ten Taxpayers Citizen Group v.
Cape Wind Associates, LLC,
278 F.Supp.2d 98 (D.Mass. 2003) 1, 3

Ten Taxpayer Citizens Group v.
Cape Wind Associates, LLC,
373 F.3d 183 (1st Cir. 2004) ..... *passim*

United States v. Alaska,
503 U.S. 569 (1992) 2n

United States v. Maine,
420 U.S. 515 (1975) 5

United States v. Maine,
475 U.S. 89 (1986) 5

United States v. United Continental Tuna Corp.,
425 U.S. 164 (1976) 13

CODES AND STATUTES:

United States Code

16 U.S.C. § 1801(c)(1) 7, 13
16 U.S.C. § 1802(10) 8
16 U.S.C. § 1802(11) 7
16 U.S.C. § 1811 15
16 U.S.C. § 1811(a) 7
16 U.S.C. §§ 1821-24 7
16 U.S.C. §§ 1851-54 7
16 U.S.C. § 1852(a) 8
16 U.S.C. § 1853(a)(7) 8
16 U.S.C. § 1855(b)(2) 8, 14, 15n
16 U.S.C. § 1855(b)(4) 8, 14, 15
16 U.S.C. § 1856(a)(2) 7, 13
28 U.S.C. § 1332 10
28 U.S.C. § 1441(b) 10
33 U.S.C. § 401 1

42 U.S.C. § 1301 6
42 U.S.C. § 1332(1) 6, 12
43 U.S.C. § 1331(a) 6
43 U.S.C. § 1333(a)(1) 6, 12, 15
43 U.S.C. § 1333(a)(2) ..... *passim*
43 U.S.C. § 1333(a)(3) 12
43 U.S.C. § 1333(d) 6
43 U.S.C. § 1333(e) 1, 6
43 U.S.C. §§ 1334, 1335, 1337 6

Code of Federal Regulations

33 C.F.R. § 320.4(a) 2n
50 C.F.R. § 600.920 ..... 8n

Massachusetts General Laws

c. 132A, § 15 14
c. 214, § 7A 16

MISCELLANEOUS:

Pub. L. 96-623 §403, 98 Stat. 3408 7

Pub.L. 104-297, § 102, 110 Stat. 3559 8

128 Cong. Rec. 316585
(97th Cong.2d Sess.Dec.16, 1982) 8

OPINIONS BELOW

The opinion of the United States District Court dismissing the Petitioners' complaint is reported at Ten Taxpayers Citizen Group v. Cape Wind Associates, LLC, 278 F.Supp.2d 98 (D.Mass. 2003). The opinion of the Court of Appeals for the First Circuit affirming the District Court is reported at Ten Taxpayer Citizens Group v. Cape Wind Associates, LLC, 373 F.3d 183 (1st Cir. 2004).

STATEMENT OF THE CASE

This case arises from the construction of a temporary test tower to collect scientific data pursuant to a permit issued by the U.S. Army Corps of Engineers in a section of Nantucket Sound over which the federal government exercises paramount jurisdiction. The Ten Taxpayer Citizens Group ("Ten Taxpayers"), Petitioners in this case, claim that erection of the test tower violated state law and that their challenge to the tower should have remained in state court. The District Court and the First Circuit disagreed on both counts.

The case has its genesis in the plans of Respondent Cape Wind Associates, LLC to build a wind farm consisting of 130 electricity-generating wind turbines on Horseshoe Shoals, an area of Nantucket Sound more than three miles from the mainland of Massachusetts and from the islands of Nantucket and Martha's Vineyard. To gather data about the winds and ocean currents in this portion of the Sound, Cape Wind applied to the Army Corps of Engineers for permission under the Rivers and Harbors Act, 33 U.S.C. § 401, and the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1333(e), to erect a tower (referred to as a Scientific Measuring Devices Station

or "SMDS") on Horseshoe Shoals.[1] After soliciting public comment and holding two public hearings, the Corps of Engineers granted Cape Wind permission to build and maintain the SMDS for not more than five years.[2] The SMDS, which is now in operation, consists of a tower and various scientific instruments supported by three piles, occupying about 900 square feet of ocean.

In September 2002, before construction of the SMDS began, the Ten Taxpayers filed suit in Massachusetts Superior Court against Cape Wind and the Corps of Engineers and obtained an *ex parte* temporary restraining order. The federal defendants removed the case to the United States District Court for the District of Massachusetts. After the District Court denied the Ten Taxpayers' request for a preliminary injunction, the temporary restraining order expired by its terms and construction of the SMDS got underway.[3]

---

[1] Cape Wind filed a separate application for permission to build the wind farm. That application is still pending before the Corps of Engineers, which has recently released a draft environmental impact statement for public comment. Information about the status of the wind farm application appears on the web site of the Corps of Engineers, New England District, at http://www.nae.usace.army.mil/projects/ma/ccwf/windfarm.htm.

[2] The Ten Taxpayers refer to the Corps' permit as a "navigability permit." Petition at 2. In fact, as required by its regulations, 33 C.F.R. § 320.4(a), the Corps performed an extensive public interest analysis that went far beyond issues of navigability. The Corps' Environmental Assessment and Statement of Findings can be found at http://www.nae.usace.army.mil/projects/ma/ccwt/ea.pdf. See also United States v. Alaska, 503 U.S. 569, 581-83 (1992), upholding the Corps' public interest regulations.

[3] Construction was completed in December 2002 and SMDS is now in operation. Real-time data from the SMDS can be found at http://capewind.whgrp.com.

The Ten Taxpayers then dismissed their first suit and brought the present action, again in state court, but this time omitting the federal defendants. In their new complaint, the Ten Taxpayers conceded that the proposed SMDS would be located in federal waters, but claimed that an amendment to the Magnuson-Stevens Fishery Conservation and Management Act ("Fishery Act") gave Massachusetts jurisdiction over all activities in Nantucket Sound, including those not directly related to fishing. They further alleged that Cape Wind had failed to obtain permits required by Massachusetts law, including the Massachusetts Ocean Sanctuaries Act. Cape Wind immediately removed the case to federal district court. The Ten Taxpayers moved to remand, but the District Court denied their motion without opinion.

Reaching the merits of the Ten Taxpayers' claims, the District Court held that the seabed of Nantucket Sound more than three miles from shore was an area of exclusive federal jurisdiction. 278 F.Supp.2d at 100. The Court rejected the Ten Taxpayers' argument that an amendment to the Fishery Act had transferred plenary jurisdiction over the seabed of the Sound from the federal to the state government. In the District Court's view, the delegation of authority "for purposes of [the Fishery Act]" did not give Massachusetts jurisdiction over structures like the SMDS that were unrelated to any fishing activity. 278 F.Supp.2d at 100-01. Accordingly, the District Court dismissed the complaint, and the Ten Taxpayers appealed.

On appeal, the Ten Taxpayers pressed their contention that removal of their case from state court was improper because no federal question appeared on the face of their complaint.[4] In response, Cape Wind advanced three grounds for federal question

[4] The Ten Taxpayers and Cape Wind are all citizens of Massachusetts, so no diversity existed.

jurisdiction: first, the Ten Taxpayers' claims depended on a grant of jurisdiction in a federal statute, the Fishery Act; second, the Ten Taxpayers' claims necessarily required resolution of a substantial federal question and thus there was jurisdiction under Smith v. Kansas City Title and Trust Co., 255 U.S. 180 (1921); and third, federal law completely preempted state law on the outer Continental Shelf. See Beneficial National Bank v. Anderson, 539 U.S. 1 (2003). The First Circuit rejected Cape Wind's first basis for federal jurisdiction, concluding that it was in essence a "federal preemption defense" and thus did not confer federal question jurisdiction. 373 F.3d at 191-92. The Court nevertheless upheld federal jurisdiction on the grounds that, under OCSLA, 43 U.S.C. § 1333(a)(2), any state laws applicable to the seabed of the outer Continental Shelf and to structures erected on the seabed are treated as surrogate federal law. The Ten Taxpayers' state law claims therefore arose under federal law. 373 F.3d at 192-93. Since it concluded that OCSLA provided a basis for federal question jurisdiction, the First Circuit did not reach Cape Wind's second and third grounds for upholding removal. 373 F.3d at 193, n.10.[5]

Turning to whether the District Court properly dismissed the Ten Taxpayers' complaint, the First Circuit held that the state statutes and regulations on which the Ten Taxpayers relied did not, by their terms, apply to the federal portion of Nantucket Sound. 373 F.3d at 194-95. Moreover, the First Circuit noted that the Massachusetts Department of Environmental Management, the agency that administers the Commonwealth's Ocean Sanctuaries Act, had expressly disclaimed authority over

---

[5] Since the Court did not reach two of Cape Wind's three arguments, the Ten Taxpayers are plainly wrong when they assert at page 7 of the Petition that the First Circuit rejected all the grounds advanced by Cape Wind for removal jurisdiction.

Horseshoe Shoals. 373 F.3d at 195-96. (The letters disclaiming jurisdiction are reproduced in an appendix to this brief). Finally, the First Circuit held that, even if the state laws cited by the Ten Taxpayers did by their terms apply to Horseshoe Shoals, those statutes would be inconsistent with the federal government's exclusive power to manage and dispose of the resources of the outer Continental Shelf. 373 F.3d at 196-97. The First Circuit therefore affirmed the decision of the District Court. After the First Circuit denied their request for a rehearing *en banc*, the Ten Taxpayers filed the present Petition for Certiorari.

THE LAW GOVERNING NANTUCKET SOUND

As the Court of Appeals noted, the law governing Nantucket Sound is "complex and rather obscure." 373 F.3d at 187. We will, therefore, first address the legal framework within which the present dispute arises.

a. Regulation of the Seabed

In United States v. Maine, 420 U.S. 515 (1975), this Court held that the United States was entitled to exercise sovereign rights over the seabed and subsoil of the Atlantic ocean lying more than three miles from shore to the exclusion of the coastal states. In a later ruling arising from the same lawsuit, United States v. Maine, 475 U.S. 89 (1986), the Court rejected Massachusetts' attempt to establish an exception for Nantucket Sound and held that the Sound consisted partly of state waters and partly of federal waters. It is undisputed that Horseshoe Shoals, the site of the SMDS, lies in federal waters more than three miles off the coast of Massachusetts. The site is therefore part

of the outer Continental Shelf for purposes of OCSLA. 43 U.S.C. §§ 1331(a) and 1301.

OCSLA, which was enacted in 1953, declares that the subsoil and seabed of the outer Continental Shelf are subject to the jurisdiction, control, and power of disposition of the United States. 43 U.S.C. § 1332(1). The Act extends the Constitution and laws of the United States to the seabed and to structures erected on the seabed "to the same extent as if the outer Continental Shelf were an area of exclusive federal jurisdiction located within a state." 43 U.S.C. § 1333(a)(1). The Act also provides that, to the extent not inconsistent with federal law, the civil and criminal laws of adjacent states are declared to be the laws of the United States applicable to the seabed of the Shelf and to structures erected on the seabed. 43 U.S.C. § 1333(a)(2). Other provisions of OCSLA give the Secretary of Commerce authority to grant leases for the extraction of oil and mineral resources from the outer Continental Shelf, 43 U.S.C. §§ 1334, 1335, 1337, and grant the Coast Guard and the Secretary of the Army authority to regulate structures erected on the Shelf. 43 U.S.C. §§ 1333(d) and 1333(e).

Thus, in the area of Nantucket Sound where Cape Wind erected the SMDS, OCSLA grants the federal government exclusive authority to regulate the seabed and construction on the seabed.

b. Regulation of Fisheries.

In 1976, twenty-three years after the adoption of OCSLA, Congress enacted the Fishery Act to address serious declines in the fishing stocks in the ocean waters off the coast of the United States. The Fishery Act asserts "sovereign rights and exclusive fishery management authority" over fishery resources within

the "exclusive economic zone," an area that begins at the seaward boundary of state jurisdiction and extends 197 nautical miles out to sea. 16 U.S.C. § 1811(a); see also § 1802(11)(defining the exclusive economic zone). Within that area, the Fishery Act regulates who may fish, §§ 1821-24, by what means they may fish, §1821, and how much fish they may catch. §§ 1851-54. The Fishery Act also declared that Congress intended "to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources...." 16 U.S.C § 1801(c)(1).

There soon proved to be practical problems in administering the Fishery Act in pockets of federal waters surrounded by state waters. In 1983, Congress addressed these problems by adopting 16 U.S.C. § 1856(a)(2), added by Pub. L. 96-623 §403, 98 Stat. 3408, which provides in relevant part:

> For purposes of this chapter ... the jurisdiction and authority of a state shall extend-
>
> (A) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States...;
>
> (B) with respect to the body of water commonly known as Nantucket Sound, to the pocket of water west of the seventieth meridian...; and
>
> (C) to the waters of Southeastern Alaska....

According to Representative Studds, one of the sponsors of the amendment, Nantucket Sound was included to ensure uniform fisheries management and fisheries law enforcement throughout the Sound. 128 Cong. Rec. 316585 (97th Cong.2d Sess.Dec.16, 1982).

In 1996, Congress again amended the Fishery Act, this time to provide additional protection for essential fish habitats, defined to include the "waters and substrate" necessary for fish spawning and growth. 16 U.S.C. § 1802(10), added by Pub.L. 104-297, § 102, 110 Stat. 3559. As amended, the Act now requires that the Fisheries Management Councils established by 16 U.S.C. § 1852(a) must, among their other duties, designate essential fish habitats for the species they manage, assess the effects of fishing practices on those habitats, and take steps to ameliorate adverse impacts caused by fishing. § 1853(a)(7). In addition, any federal agency that is contemplating action that might adversely affect an essential fish habitat must consult the Secretary of Commerce, who is required to make recommendations to mitigate the impact of the proposed action on the habitat. 16 U.S.C. §§ 1855(b)(2), 1855(b)(4).[6]

The Ten Taxpayers have seized on the 1983 and 1996 amendments to the Fishery Act as a basis to claim that state law now governs the seabed of Nantucket Sound. Reading these amendments together, the Ten Taxpayers claim that the Fishery Act

---

[6] In this case, the requirements of the Fishery Act were followed to the letter. Before granting Cape Wind's application, the Corps of Engineers consulted the National Marine Fisheries Service, the agency that administers the essential fish habitat program. See 50 C.F.R. § 600.920. The Service advised the Corps that the SMDS would have only minimal impact on fish habitat, and it did not propose any conservation measures. The Corps concurred in the Services's assessment. See http://www.nae.usace.army.mil/projects/ma/ccwt/ea.pdf at pages 10-11.

gives Massachusetts jurisdiction over any construction on the "substrate" of Nantucket Sound, even if no fishing-related activity is involved. In effect, they contend that, as a result of these amendments to the Fishery Act, the provisions of OCSLA granting the federal government exclusive jurisdiction over the seabed of the outer Continental Shelf no longer apply in Nantucket Sound.

SUMMARY OF ARGUMENT

The Ten Taxpayers have failed to demonstrate a compelling reason for granting a writ of certiorari. The First Circuit's interpretation of OCSLA is consistent with the decisions of this Court and other federal courts, and is also consistent with the purposes of OCSLA as declared by Congress. The Ten Taxpayers are in substance arguing that the Fishery Act partially repealed OCSLA by implication, but such repeals are strongly disfavored, and the Ten Taxpayers have failed to address the criteria for implied repeal in their Petition. Finally, the First Circuit did not deprive Massachusetts of any opportunity to apply its own statutes. Massachusetts enforcement officials were notified of the Ten Taxpayers' claims but chose to take no action because they understood that the federal government had exclusive jurisdiction over Horseshoe Shoals.

ARGUMENT

I. THE FIRST CIRCUIT'S INTERPRETATION OF OCSLA IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS AND WITH THE PURPOSES OF OCSLA AS DECLARED BY CONGRESS.

In deciding that there was federal question jurisdiction, the First Circuit relied on 42 U.S.C. § 1333(a)(2), which provides in relevant part:

> "To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws....*the civil and criminal laws of each adjacent state....are declared to be the laws of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon,* which would be within the area of the State if its boundaries were extended seaward to the outer margin of the of the outer Continental Shelf...." (emphasis supplied).

It is undisputed that Cape Wind's SMDS is a fixed structure erected on the seabed of the outer Continental Shelf. The First Circuit reasoned that, if Massachusetts laws apply to the SMDS at all, then § 1333(a)(2) declares that those laws are to be treated as surrogate federal laws. Thus the Ten Taxpayers' state law claims necessarily arise under the laws of the United States for purposes of federal question jurisdiction under 28 U.S.C. § 1332, and Cape Wind was entitled to remove these claims to federal court pursuant to 28 U.S.C. § 1441(b). 373 F.3d at 192-93.

The First Circuit's construction of § 1333(a)(2) is consistent with this Court's decision in Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969). In that case, after reviewing the relevant language of OCSLA, the Court concluded that "[i]t is evident ... that federal law is 'exclusive' in its regulation of this area [the outer Continental Shelf], and that state law is adopted only as surrogate federal law." Id. at 357. Similarly, in Gulf Offshore Oil Co. v. Mobil Oil Corp., 453 U.S. 473 (1981), this Court, construing § 1333(a)(2), stated that "[a]ll law applicable to the outer Continental Shelf is federal law, but to fill the substantial 'gaps' in the coverage of federal law, OCSLA borrows the 'applicable and not inconsistent' laws of the adjacent States as surrogate federal law." Id. at 480.

Other federal courts have interpreted OCSLA in the same way. In Hufnagel v. Omega Serv. Indus., Inc., 182 F.3d 340 (5th Cir. 1999), a worker injured on a drilling platform attached to the outer Continental Shelf brought suit under a Louisiana statute in a Louisiana state court. The Fifth Circuit held that the defendants were entitled to remove the case to federal district court because, under 43 U.S.C. § 1333(a)(2), the Louisiana statute on which plaintiff relied became federal law when applied to an accident occurring on the outer Continental Shelf. 182 F.3d at 348-51. To the same effect, see Hodges v. Shell Oil Co., 1997 WL 473809, at 3-5 (E.D.La. Aug.19, 1997).

By recognizing that the law governing the outer Continental Shelf is exclusively federal, this Court and the other federal courts are carrying out the intent of Congress as manifested in OCSLA. In adopting OCSLA, Congress declared that "the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this

subchapter." 42 U.S.C. § 1332(1). Congress also declared that "the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public...." Consistent with these declarations of purpose, § 1333(a)(1) provides that the subsoil and seabed of the outer Continental Shelf shall be treated as "an area of exclusive federal jurisdiction within a State." See also § 1333(a)(3) (provisions adopting state law as federal law do not provide any state with a basis for claiming jurisdiction over the Shelf.) Thus, the adoption of state law as surrogate federal law is simply one aspect of OCSLA's program to assert exclusive federal control over the subsoil and seabed of the outer Continental Shelf. OCSLA leaves no room for state law to apply except as surrogate federal law.

The Ten Taxpayers, perhaps seizing on some of the language of this Court quoted above, argue that OCSLA adopts state law as surrogate federal law only if necessary to fill some gap not otherwise provided for by Congress. Petition at 7. Their argument confuses one of the purposes of § 1333(a)(2) with the means Congress chose. Under § 1333(a)(2), any state law applicable to the outer Continental Shelf becomes federal law, as long as it is not inconsistent with other federal law. In this case, the Ten Taxpayers claim that various Massachusetts statutes apply by their terms to the SMDS. Accepting their logic, OCSLA, as interpreted by this Court, requires that the Massachusetts statutes on which the Ten Taxpayers rely must be treated solely as surrogate federal law. There is no compelling reason to revisit this settled principle. The Ten Taxpayers' complaint was therefore properly removed to federal court.

II. THE TEN TAXPAYERS HAVE FAILED TO SHOW THAT THE FISHERY ACT IMPLIEDLY REPEALED THE PROVISIONS OF OCSLA GOVERNING THE SEABED OF NANTUCKET SOUND.

Although they scrupulously avoid using the term, the Ten Taxpayers in essence argue that the 1983 amendment to the Fishery Act dealing with pockets of federal waters, read together with the 1996 amendments concerning essential fish habitats, partially repeal OCSLA's program of exclusive federal control over the seabed of Nantucket Sound and the other pockets of federal waters described in 16 U.S.C. § 1856(a)(2). The Ten Taxpayers have failed, however, to satisfy or even to address the stringent criteria for finding an implied repeal of a federal statute.

The decisions of this Court have established that repeals by implication are strongly disfavored. See e.g., United States v. United Continental Tuna Corp., 425 U.S. 164, 168-69 (1976) and cases cited. To overcome the strong presumption against such repeal, there must either be an affirmative showing of an intention to repeal or a demonstration that the two statutes are irreconcilable. Morton v. Mancari, 417 U.S. 535, 549-50 (1974) cited with approval in J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 141-44 (2001).

There is nothing in the language or legislative history of the Fishery Act to indicate that Congress thought it was amending OCSLA. On the contrary, Congress declared that it intended to "maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources...." 16 U.S.C. § 1801(c)(1). When this language was adopted in 1976, the "ocean jurisdiction

of the United States" included jurisdiction over the subsoil and seabed of the outer Continental Shelf, as provided in OCSLA. Congress obviously thought that OCSLA and the Fishery Act could peacefully coexist.

Moreover, the construction of the Fishery Act advocated by the Ten Taxpayers is inconsistent with exclusive federal control of the resources of the outer Continental Shelf, one of the central purposes of OCSLA. If states like Massachusetts can require those seeking to develop the resources of the Shelf to obtain state as well as federal permits, the states can effectively exercise veto power over developments that the federal officials charged with administering OCSLA have approved. See 373 F.3d at 197. Indeed, one state law on which the Ten Taxpayers rely, the Massachusetts Ocean Sanctuaries Act, would prohibit most forms of development in the federal waters of Nantucket Sound. Mass. Gen. Laws, c. 132A, § 15. It is improbable that Congress would adopt such a fundamental change in OCSLA *sub silentio*.

The Ten Taxpayers claim that, under the Fishery Act, Massachusetts is entitled to exercise the same powers over essential fish habitat in Nantucket Sound that the Fishery Act grants to the Secretary of Commerce in 16 U.S.C. § 1855(b)(4), a provision which they describe as giving "legislative teeth" to the Act. Petition at 9. They ignore, however, the limitations that Congress placed on the Secretary's authority. The Fishery Act, as amended in 1996, requires a federal agency contemplating action that might affect an essential fish habitat to first consult the Secretary of Commerce. Id., § 1855(b)(2). The Secretary, in turn, is required to advise the agency with primary responsibility for the project about how best to conserve the affected fish habitats. Id., §

1855(b)(4).[7] However, once the consultation process has run its course, the Secretary has no power to prohibit the proposed project or to require the consulting agency to adopt the mitigating measures he suggested. Nothing in § 1855(b)(4) suggests that the Secretary of Commerce or Massachusetts officials standing in his shoes can prohibit construction that the Corps of Engineers has approved.

In fact, as the First Circuit correctly understood, OCSLA and the Fishery Act are complementary assertions of federal jurisdiction over different resources of the outer Continental Shelf. 373 F.2d at 197. In OCSLA, Congress asserted control over the subsoil and seabed of the outer Continental Shelf and to fixed structures erected on the Shelf. 43 U.S.C. §§ 1332(1), 1333(a)(1), 1333(a)(2). In the Fishery Act, Congress asserted fishery management authority over the fish that inhabit the Shelf. 16 U.S.C. § 1811. When it amended the Fishery Act to provide state control over pockets of federal waters, Congress gave states like Massachusetts the authority to regulate fishing-related activity in the affected waters, but Congress did not cede exclusive federal jurisdiction of the subsoil and seabed. Construed in this manner, the two statutes can, as the First Circuit observed, "readily co-exist." 373 F.3d at 197. The Ten Taxpayers have simply failed to cite any evidence of an irreconcilable conflict between OCSLA and the Fishery Act.

---

[7] As indicated in footnote 6, above, the procedures mandated by § 1855(b)(2) and (4) were followed in this case.

III. MASSACHUSETTS HAD AMPLE OPPORTUNITY TO ENFORCE ITS OWN STATUTES, BUT CHOSE NOT TO, BECAUSE THE STATUTES DO NOT APPLY.

In their Petition, the Ten Taxpayers urge that review by this Court is warranted because Massachusetts has been deprived of an opportunity to "interpret the contours of its own laws." Petition at 6. In fact, the Massachusetts officials responsible for enforcing the statutes on which Petitioners rely were notified of the alleged violations but chose to take no action.

The Ten Taxpayers based their lawsuit on Mass. Gen. Laws c. 214, § 7A. That statute permits citizens to bring suit to restrain injury to the Massachusetts environment caused by violations of environmental protection laws, but only if the citizens first give notice of the violations to the officials responsible for enforcing the laws. In this case, the Ten Taxpayers gave notice to the Attorney General of Massachusetts, the Massachusetts Secretary of Environmental Affairs, the Commissioner of the Department of Environmental Management, the Commissioner of the Department of Environmental Protection, and the Commissioner of the Department of Fisheries, Wildlife and Environmental Law Enforcement.[8] None of these officials chose to take action against Cape Wind or to join in the Ten Taxpayers' lawsuit. One agency, the Department of Environmental Management, told the attorney for the Ten Taxpayers on two different occasions that jurisdiction over Horseshoe Shoals lies with the federal government. See Appendix at 1a-5a.

---

[8] Copies of the letters to these officials and return receipts demonstrating delivery were attached to the Ten Taxpayers' complaint filed in the court below but are not reproduced in the Appendix to the Petition.

Massachusetts has not been deprived of an opportunity to construe its laws. Rather, the responsible Massachusetts officials decided not to enforce those laws against Cape Wind because they correctly concluded that the laws did not apply.

CONCLUSION

In an effort to find a friendlier forum for injunctive relief, the Ten Taxpayers brought an action in a Massachusetts state court based on state law, even though the work they sought to enjoin took place on the seabed of the outer Continental Shelf. The First Circuit concluded that, under OCSLA, the law applicable to the outer Continental Shelf is exclusively federal. That ruling is consistent with the plain language of OCSLA and with decisions of this Court. The Ten Taxpayers have failed to demonstrate any compelling reason to revisit this Court's interpretation of OCSLA and their Petition should accordingly be denied.

Respectfully submitted,

RICHARD W. RENEHAN
GOULSTON & STORRS
A Professional Corporation
400 Atlantic Avenue
Boston, Massachusetts 02110
(617) 482-1776

Counsel of Record for the Respondent Cape Wind Associates, LLC

Of Counsel:

TIMOTHY J. DACEY
KURT W. HAGUE
GOULSTON & STORRS
A Professional Corporation

APPENDIX

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

251 CAUSEWAY STREET, SUITE 600-700
BOSTON, MA 02114-2104
PHONE: 617-626-1250 FAX: 617-626-1449
www.state.ma.us/dem/

January 24, 2002

John W. Spillane
Spillane & Spillane LLP
23 Institute Road
Worcester, MA 01609

RE: EOEA file #12643, Army Corps file #199902477

Dear Mr. Spillane:

I am responding to your various letters regarding the proposed Windmill Farm in Nantucket Sound and, specifically, the applicability of the Ocean Sanctuaries Act to the proposed construction of a data gathering tower and associated measuring devices on Horseshoe Shoals. I refer specifically to your letter to me of December 27, 2001, your letter to Karen Kirk Adams of January 4, 2002, and your letter to Secretary Bob Durand of January 8, 2002.

In general, the seaward boundaries of the Ocean Sanctuaries follow the Exterior Line of the Commonwealth and are defined in MGL 132A §13 which you have referenced. While the original 1970's legislation establishing the sanctuary does state that

the Cape and Islands Ocean Sanctuary is intended to include Nantucket Sound, the United States Supreme Court, in 1986 (475 U.S. 89), decided that not all of the waters of Nantucket Sound are under the jurisdiction of the Commonwealth of Massachusetts, but are partly territorial sea and partly high seas. The official maps depicting the boundaries of the Sanctuary do not include the area known as Horseshoe Shoals, and jurisdiction over the central portion of the Sound, including Horseshoe Shoals, is with the federal government. The delineation of that area is partially shown on the map I sent to you on December 28, 2001. At that time I also sent the citation of the Supreme Court ruling referenced above.

That being said, it must be emphasized that the Department of Environmental Management maintains a direct interest in the proposed wind farm project inasmuch as trenching, cabling and other activities are proposed to occur in the Cape and Islands Ocean Sanctuary. Our oversight is governed by section 16, as well as sections 14, 15 and 18 of the Act. In accordance with the Department's obligations under the Act, we will fully study the proposal and pertinent permit applications, and we will submit appropriate comments to the relevant permitting agencies.

If you have any questions regarding the issue of jurisdiction of the Ocean Sanctuaries, I am available to discuss this matter with you in greater detail.

Sincerely,

Myron Gildesgame, Director
Office of Water Resources and
Massachusetts Ocean Sanctuaries Coordinator

cc: Bob Durand (MEPA)
Peter C. Webber, DEM.
Steve Tucker, CCC
Elizabeth Koulouheras
Jane Mad, CZM
Karen Kirk Adams, New England District, ACOE
U.S. Senator Edward M. Kennedy
U.S. Senator John F. Kerry
Congressman William Delahunt
Senator Robert O'Leary
Representative Demetrious Atsalis
Representative Thomas George
Town of Barnstable, Town Council
Town of Yarmouth, Board of Selectmen
Barnstable Conservation Commission
Yarmouth Conservation Commission
Massachusetts Aeronautics Commission
Rupert L. Nichols, President, MMTA c/o Spillane & Spillane

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

251 CAUSEWAY STREET, SUITE 600-700
BOSTON, MA 02114-2104
PHONE: 617-626-1250 FAX: 617-626-1449
www.state.ma.us/dem/

February 14, 2002

John W. Spillane
Spillane & Spillane LLP
23 Institute Road
Worcester, MA 01609

Subject: Horseshoe Shoals

Dear Mr. Spillane:

Thank you for your letter of January 31, 2002 and the copy of your February 1, 2002 letter to Karen Kirk Adams regarding your legal opinion of the Department's jurisdiction over Nantucket sound and in particular, over the area which includes Horseshoe Shoals.

While I appreciate your legal research and opinions regarding the U.S. Supreme Court's decision relative to state jurisdiction claims, the Department and the Ocean Sanctuaries Program have not claimed jurisdiction over the area of the sound which includes Horseshoe Shoals, and respectfully decline to seek to expand our current jurisdiction. This position is also in agreement with the position of the Cape Cod Commission which has also researched the project.

Please keep me advised of any further actions you may pursue in this matter.

Sincerely,

Myron Gildesgame, Director
Office of Water Resources and
Massachusetts Ocean Sanctuaries Coordinator

cc: Rupert L. Nichols, president MMTA c/o Spillane & Spillane
Bob Durand, EOEA
Peter C. Webber, DEM
Steve Tucker, Cape Cod Commission
Elizabeth Koulouheras
Jane Mead, CZM
Karen Kirk Adams, New England District, ACOE
U.S. Senator Edward M. Kennedy
U.S. Senator John F. Kerry
Congressman William Delahunt
Senator Robert O'Leary
Representative Demetrious Atsalis
Representative Thomas George
Town of Barnstabe, Town Council
Town of Yarmouth, Board of Selectmen
Barnstable Conservation Commission
Yarmouth Conservation Commission
Massachusetts Aeronautics Commission